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NO. 21178

3433
V.3433

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLIE BOB WESLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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SHELBY R. GOTT,
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FILED

JUL 28 1967

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant Charlie Bob Wesley to be guilty of the one-count indictment following trial by the Court (C.T. 4).

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 495 and 3231. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Section 1291 and 1294.

1/ "C.T." refers to Clerk's Transcript.

II

STATEMENT OF THE CASE

Appellant Charlie Bob Wesley was charged in the one-count indictment returned by the Federal Grand Jury for the Southern District of California, Southern Division, at San Diego, California on January 5, 1966. (C. T. 2) .

The only count in the indictment alleged that appellant Charlie Bob Wesley wilfully and knowingly forged, counterfeited and falsely made the endorsement and signature of the payee, Robert W. White to United States Treasurer's Check No. 22,554,901, dated July 31, 1965, in the amount of $58.00 for the purpose of obtaining and receiving from the United States and its officers and agents the sum of $58.00.

A Jury waiver was executed on April 5, 1966 and trial by the Court commenced and ended on the same date before United States District Judge James M. Carter. (R.T.2).[2/] Appellant was found guilty as charged on April 5, 1966 (R.T. 93) and was sentenced on June 6, 1966 to the custody of the Attorney General for eight years (C.T. 4).

Appellant filed a notice of appeal on June 13, 1966. (C.T. 5).

III

ERROR SPECIFIED

The Error Specified by appellant is paraphrased as follows:

1. That the conviction is unsupported by evidence and is therefore invalid.

2/ "R.T." refers to Reporter's Transcript

2. That the Trial Judge was biased and prejudiced.

3. That the handwriting samples should not have been admitted because of appellant's health at the time they were taken.

IV

STATEMENT OF THE FACTS

Robert W. White receives a monthly military disability check as a result of being in the army. He never received his check that was due on July 31, 1965, in the amount of $58.00. (R.T. 4, 5).

Mr. White has known appellant (R.T. 6) about fifteen years, but never authorized appellant to endorse White's name on the check, cash it, or do anything with the check (R.T. 7).

Appellant resides at 2803 Imperial Avenue, San Diego, California (R.T. 4).

The check always comes in his mailbox and Mr. White or his mother always pick it up. Mr. White never entrusted a friend to pick up his check. (R.T. 10).

The check in question was cashed at the Cash King Market by an unknown person (R.T. 14-15). The check was returned to them. (R.T. 16).

Mr. White viewed the endorsement "Robert W. White, 2803 Imperial Avenue" and this was not his writing. He didn't authorize anyone else to sign the check (R.T. 6).

Ralph Schoonover, handwriting expert, testified concerning authorship of the forged endorsement. Counsel for appellant stipulated to his qualifications on the subject. (R.T. 17).

Mr. Schoonover used Secret Service Forms 1607, Exhibits 2A and 2B, obtained by Harley Limke, Special Agent, Secret Service and Floyd Cozad, Postal Inspector. (R.T. 19).

He also used Exhibits 3A, 3B, and 3C which were San Diego Police Department exemplar forms. Mr. Schoonover has examined appellant's handwriting in over 50 separate instances and is familiar with appellant's handwriting. He looked at other handwriting of appellant in this case (R.T. 20).

There were definite distinctive characteristics of this writer that have shown up in the past. (R.T. 22).

The letter "I" has "a very distinctive and individual characteristic" (R.T. 22). Mr. Schoonover went through fifty or sixty pages of appellant's writing (R.T. 85).

Mr. Schoonover testified that in his opinion appellant attempted to disguise his handwriting on exhibit one, the check in question. He also testified to an attempt to disguise the writing on second sheet of the exemplars of the Secret Service where the writing was of the name Robert W. White, the name in question. (R.T. 21, 29).

Appellant testified on direct examination that he had not endorsed any government checks since being released from prison (R.T. 55, 57). He specifically denied having endorsed exhibits 5 and 6, said exhibits consisting of U. S. Treasury Checks. (R. T. 58, 60)

Mr. Schoonover testified that in his opinion appellant endorsed these 2 checks also (R.T. 64) as well as six other U. S. Treasury checks (R.T. 65).

Mr. Schoonover also eliminated appellant as the author of the Alonzo Cousins check. (R.T. 66, 74). Exhibit 2A was not disguised, while exhibit 2B was disguised. (R.T. 66).

The disguised exemplars and the disguised questioned writing compare favorably (R. T. 30). In finding that appellant endorsed exhibit one, Mr. Schoonover used the following expressions:

Not the slightest doubt in his mind (R.T. 25)

He was 100 per cent sure (R.T. 40)

No chance for error in this case (R.T. 32)

One in a trillion (R.T. 36)

Appellant claimed to live 15 or 20 blocks from the addressee. Harley Limke testified he lived a total of 8-1/2 blocks from the addressee and four of these were short blocks. (R.T. 89).

Appellant had been convicted of a felony (R.T. 60).

V

ARGUMENT

A. THE CONVICTION OF APPELLANT WAS SUPPORTED BY SUFFICIENT EVIDENCE.

Appellant contends that his conviction was based on inherently incredible evidence. Having made this unwarranted assumption, he then proceeds to invoke the doctrine of Thompson v. City of Louisville, 362 U. S. 199 (1960), contending that such evidence amounts to no evidence at all, and hence will not support a conviction.

To so contend is to misread the import of the Thompson case. Later cases have held Thompson applicable only where there is no evidence of guilt. It has not been expanded by analogy. Clearly, this is not such a case.

See: Cox v. Louisiana, 379 U. S. 559 (1964).

DeHam v. Decker, 361 F.2d 477 (5th Cir. 1966).

Appellant complains that there was no eye-witness testimony used to convict. It is submitted that eye-witness testimony in a prosecution for forgery is almost never forthcoming. The very nature of the offense requires that it usually be proved by circumstantial evidence.

Appellant asserts that the only evidence linking him with the crime was the uncorroborated testimony of the handwriting expert, Mr. Schoonover, from the San Diego Police Department. There was no attempt by appellant to discredit Mr. Schoonover or to impeach his credentials. In fact, appellant stipulated to his qualifications (R.T.17). Mr. Schoonover is a recognized expert in his field, and testified in a very forthright manner. Mr. Schoonover testified that he had probably examined appellant's handwriting over fifty separate times over a period of years (R.T. 20). He explained in detail the bases for his opinions, and the scientific nature of his specialty. He described in detail the distinguishing characteristics that were present in the exemplars of appellant's handwriting and the check in question (R.T. 20-25). Contrary to appellant's contention that his opinion was based on insufficient samples, Mr. Schoonover asserted that he had more than enough to narrow the possibility of error to an infinitesimal degree (R.T. 32-34). Mr. Schoonover then positively

identified appellant as the author of the forged endorsement, based on his study of other writings of appellant (R.T. 39,40). When prompted by defense counsel on cross-examination he stated that he was a hundred per cent sure (R.T.40). His testimony was totally uncontradicted, except by appellant's denial. Appellant could have produced his own experts for this purpose. Failure to present any contradictory evidence would seem to indicate that there was none.

The weight to be given the testimony of an expert witness is purely a question of discretion for the trier of fact to determine.

Wong Ho v. Dulles, 261 F.2d 456 (9th Cir. 1959).

No criminal case has been found which touches on the question of whether expert testimony alone is sufficient to convict. There are, however, several civil cases which hold that the trial court has the privilege of relying on the testimony of a single expert witness, even if there is other testimony to the contrary, and the Court of Appeals is not privileged to overrule the trial Court.

See: Caddy - Imler Creations, Inc. v. Caddy, 299 F.2d 79 (9th Cir. 1962)

Evans v. United States, 319 F.2d 751 (1st Cir. 1963).

It is submitted that there should be no different rule for criminal cases. The basic question is one of credibility, and there is nothing in the record to indicate that the trial court should have disbelieved Mr. Schoonover.

It is well settled that on appeal, the facts are to be interpreted most favorable to the government.

Glasser v. United States, 315 U. S. 60 (1942).

Stein v. United States, 337 F.2d 14 (9th Cir. 1964).

B. THE TRIAL JUDGE WAS NOT BIASED AND PREJUDICED.

Appellant alleges that the remarks of the trial court subsequent to the verdict of guilty were indicative of "unremitting hostility" on the part of the judge, such as to deny appellant his right to a fair and impartial tribunal. This melodramatic claim cannot be reconciled with the facts in this case. Aside from the allegedly detrimental remarks (R.T.94-95) after the trial was over, a search of the record reveals no comment of the court deviating from a standard of strict impartiality.

As for the alleged prejudicial remarks, it is hard to see in them the ominous undertones read in by appellant. The trial court merely advised appellant to clear up any other potential charges against him, if indeed, any existed. The possible existence of other forgeries, appellant was not on trial for, was raised by the introduction of Exhibits 5 and 6 and by the testimony of appellant and Mr. Schoonover (R.T.57-65). Judge Carter implied he would consider any cooperation by appellant at time of sentence. These comments of the trial court, then, were to appellant's advantage rather than his detriment.

In Ferrari v. United States, 169 F.2d 353, (9th Cir. 1948), in a non-jury trial, as in this case, the "following language was used "as a prerequisite to the disqualification of a judge personal bias must be shown, which has been held to be an attitude of extrajudicial origin." citing Craven v. United States, 1 Cir., 22 F.2d 605.

In appellant's case, the remarks complained of were obviously not

personal in nature and not of extrajudicial origin but originated from admissible evidence during the trial.

Finally, at no time during the trial was the question of prejudice and hostility on the part of the trial court raised. This is difficult to reconcile with the unwarranted charge of "unremitting hostility" toward appellant. Such a claim should be given little or no weight when raised for the first time on appeal, particularly when evidence of bias and prejudice is non-existent.

C. THE HANDWRITING EXEMPLARS WERE PROPERLY ADMITTED.

Appellant contends he was ill when the handwriting exemplars were given to Special Agent Limke and Inspector Cozad.

The only evidence of the alleged illness is appellant's own testimony (R. T. 52). Appellant admits being advised of his Constitutional rights (R.T. 51, 52, 53).

Appellant was impeached by Inspector Cozad's testimony to the effect that appellant appeared normal (R.T. 74-75).

Cozad said he was calm and not nervous in any fashion while filling out Exhibit 2A, the Cousins exemplar, but seemed somewhat concerned while writing Exhibit 2B, the White exemplar.

Appellant was also impeached by his prior felony conviction and by other material mis-statements.

Juries are regularly instructed:

"If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony

of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distruct such witness' testimony in other particulars; and you may reject all the testimony of that witness, or give it such credibility as you may think it deserves."

and are further instructed:

"A defendant who wishes to testify, however, is a competent witness; and the defendant's testimony is to be judged in the same way as that of any other witness."

See: Federal Jury Practice and Instructions, by Mathes and Devitt; Instructions 9.06 and 9.12.

Interpreting the evidence most favorable to the Government, the Court may well have disregarded appellant's contentions that he was ill.

Appellant was in the office only 2 hours, during which time he was interviewed, handwriting exemplars were obtained, appellant ate lunch and the officers discussed the matter with the United States Attorneys' office (R.T.75).

Assuming, arguendo, that Exhibits 2A and 2B were inadmissible, any error would be harmless. (F.R.C.P., Rule 52(a)).[3/]

No claim of error is made, nor appears appropriate from the record

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3/ "F.R.C.P." refers to Federal Rules of Criminal Procedure.

regarding the other exemplars and the many other writings used by Mr. Schoonover in formulating his expert opinion.

It is obvious from the record, the expert opinion would have been the same, as well as the Court's finding of guilty.

No objection was made to introduction of Mr. Schoonover's testimony nor Exhibits 2A and 2B and no plain error resulted. (F.R.C.P. Rule 52 (b)).

VI

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

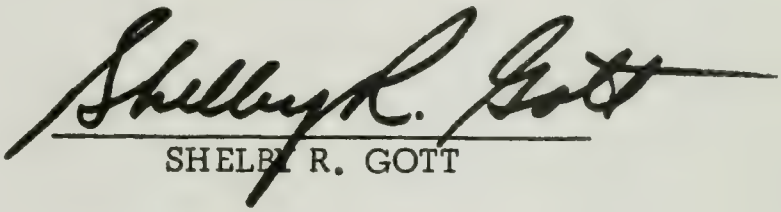
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United States of America.

CERTIFICATE

I certify in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



SHELBY R. GOTT

No. 21179

United States
Court of Appeals
for the Ninth Circuit

DEWEY EARL LAKE, JR.

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the judgment of the United States District Court for the District of Oregon

BRIEF OF APPELLEE

FILED
DEC 27 1966
WM. B. LUCK, CLERK

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No. 21179

United States
Court of Appeals
for the Ninth Circuit

DEWEY EARL LAKE, JR.

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

COUNTER-STATEMENT OF THE CASE

On September 27, 1965, appellant Lake and one Harold Goutermont were indicted for wilfully transporting and causing to be transported in interstate commerce a stolen Ingersoll-Rand Air Compressor from Portland, Oregon to Sparks, Nevada, in violation of 18 U.S.C., Section 2314 (TR. 1). [1] After a jury trial before the Honorable John F. Kilkenny, Lake and Goutermont were each found guilty. Appellant Lake was sentenced to three years in the federal penitentiary to be confined for a period of four

[1] References to the transcript of record of the District Court Clerk will be designated "TR". References to the two-volume trial transcript will be designated "R".

months, and placed on probation for the remainder of the suspended sentence. The defendant Goutermont has not appealed the judgment of conviction, and the present appeal involves solely that of appellent Lake.

The evidence to support the verdict of guilt may be briefly summarized as follows:

On April 30, 1965, an Ingersoll-Rand Air Compressor, Model D.L. 600, Serial No. 34949 (having a value of over $20,000) was received as part of a shipment from New York by the Loggers and Contractors Machinery Company in Portland (R. 168; Govt. Ex. 10). The compressor was kept on the open storage lot of the Company and was at that location on May 14, 1965 when an inventory was taken (R. 170; Govt. Ex. 11). When the next inventory was taken in mid-June, 1965, the compressor was found missing (R. 171-172, 185-188; Govt. Ex. 12).

The evidence showed that, on about May 17, 1965, appellant Lake hired a truck driver, Lee Grimm, to drive a truck from Portland to Klamath Falls. Lake instructed Grimm to rent a truck from Hertz Truck Rental. Grimm, using Lake's credit card, rented a

16 foot Ford Van on May 17, 1965, but returned the truck the following day after being told by Lake that "The load wasn't ready to go." (R. 19-20; Govt. Ex. 1). About a week later, on May 23, 1965, Grimm again rented a truck from Hertz with Lake and Goutermont present, and made a $200.00 cash down payment which he received from Lake (R. 20-21; Govt. Ex. 2). This truck—which Grimm was hired by Lake to drive to Reno, Nevada—was an 18 foot Ford Van, and was driven by Grimm to the home in Portland of one Linda Moran (R. 22). The stolen air compressor had been brought to Miss Moran's garage, and stored therein, by the defendant Goutermont some time before, and Lake, Goutermont and Grimm loaded the compressor onto the truck (R. 22, 81-82). The parties agreed to meet in Reno, with Grimm and Lake to drive in the truck, and Goutermont and Miss Moran to drive in the latter's pickup truck. [2] Upon arriving in Reno,

[2]Grimm, who was to receive $200.00 from appellant Lake for driving the truck, was instructed by Lake as to the route to take to Reno, viz: to Bend, Oregon, thence to Burns, Oregon, and from Burns down through Winnemucca, Nevada and into Reno (R. 24; Govt. Ex. 7). Moran and Goutermont followed a different route, viz: over Mt. Hood, through Madras, Oregon, to Lakeview, Oregon, and through Alturas, California to Reno (R. 85-86; Govt. Ex. 7). At the trial, the Government took the position that the route taken by the parties had significance in that Lake and Goutermont were attempting to conceal the stolen vehicle from the authorities. In this regard, the Government in-

the compressor was taken by Grimm and Lake to the home of one Donald Dugger in Sparks, Nevada, and placed in his garage (R. 139). Dugger, by prearrangement with Goutermont, was to sell the air compressor, and Lake and Goutermont informed Dugger that they wanted $15,000 for the compressor, anything over that amount to go to Dugger (R. 139-140). After negotiating with Dugger, Lake and Goutermont left the compressor in Dugger's garage, and returned to Portland (R. 144). Shortly thereafter, the air compressor was recovered by the F.B.I., and Lake and Goutermont were arrested and charged with the theft of this machine (R. 153-154). After his arrest, Lake called Grimm and told Grimm to "Keep (his) mouth shut" and "to say that Mr. Goutermont had hired (Grimm) to drive this truck" (R. 30).

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troduced evidence to show that Lake had instructed Grimm to take the longer route from Portland to Reno through Nevada rather than through California (R. 25); that the trip through California required a stop at the border checking station at Alturas, as Miss Moran testified (R. 86); that the authorities at the border checking station looked into vehicles stopped there to determine if fruit or produce are carried therein (R. 86); and that no such inspection was made at the Nevada checkpoint in McDermott, thereby minimizing the risk of discovery (R. 26-27).

I.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT.

Appellant claims (BR. 7-8, 20-21), that the Government's proof was insufficient in proving either that the air compressor was, in fact, stolen or that appellant had participated in the crime. In making this argument, we respectfully submit that appellant does no more than assert that the jury did not accept his version of the case. The evidence, viewed in the light most favorable to the Government, was amply sufficient to support the verdict. As shown by the statement above, appellant twice hired Grimm to drive a truck to transport the equipment, and provided the money to rent the truck; caused the return of the truck on the first rental since "the load wasn't ready"; directed Grimm to take the Nevada rather than the California route to Reno with a view to facilitating the concealment of the compressor; joined with Goutermont in discussing the sale of the compressor; [3] and finally, after his

[3]We note that appellant's guilty participation in the venture and his obvious knowledge that the air compressor was stolen is further shown by the palpably low amount of $15,000 which appellant and Goutermont were willing to accept. The air compressor was purchased new by Loggers and Contractors Machinery Co. a few months before at a twenty per cent discount wholesale cost of over $18,000 (R. 9-10).

arrest, warned Grimm "to keep his mouth shut" and to say that Goutermont had hired him to drive the vehicle. See statement, *supra*.

Nor was the force of the Goverment's proof at all diminished by appellant's defense. To counter the Government's case against him, appellant denied that he had hired Grimm to drive the truck (R. 295, 302); denied that he had helped Grimm and Goutermont load the compressor into the truck (R. 286-287); stated that his conversation with Grimm prior to leaving Portland for Reno revealed to him only "that some kind of machinery was being transported" (R. 287, 334); denied that he had any conversation with Dugger concerning the price to be gotten on the future sale of the compressor (R. 292); stated that the first time he learned that the equipment was an air compressor was when it was unloaded in Reno (R. 343); and declared that his purpose in making the trip was to do some gambling and to secure repayment of monies which he had loaned to Grimm and Goutermont (R. 285).

On the basis of this testimony, which was completely contrary to that of Government witnesses Grimm and Dugger, the jury could (and obviously did) readily conclude that appellant had fabricated

his testimony in an effort to blame the co-defendant Goutermont [4] and to escape criminal liability.

Finally, there is no substance whatever to appellant's assertion that the Government never proved that the compressor was in fact a stolen piece of equipment. Mr. Flatt, the office manager for Loggers and Contractors Machinery Company, testified that the air compressor in question was received in Portland on April 30, 1965, and stored in the company lot (R. 168; Govt. Ex. 10); that, on May 14, 1965, an inventory was taken and the compressor was still in the inventory at that time (R. 170; Govt. Ex. 11); that, when the next inventory was taken on about June 14, 1965, the compressor was found missing from the lot (R. 171-172, 185-188; Govt. Ex. 12); as testified to by Agent Stone of the Federal Bureau of Investigation, this same air compressor was recovered by the F.B.I. in Sparks, Nevada, at the home of Donald Dugger to which it had been brought by the co-defendants Goutermont and Lake (R. 139, 153-154); and that, on the following day, the compressor was turned over to the

[4]We note that the co-defendant Goutermont, contrary to the testimony of appellant Lake, stated that his first contact with the air compressor was through defendant Lake who stated that "he had a compressor and wanted to know if I knew where we could sell it." (R. 361).

MacLeod Trucking Co., and returned by them to the rightful owners, Loggers and Contractors Machinery Company in Portland (R. 154, 195-198; Govt. Exs. 14-15).

In short, the record reveals beyond doubt that the air compressor was stolen, and appellant's argument to the contrary (BR. 7) is without support in the evidence.

II.

THERE WAS NO PREJUDICIAL ERROR IN THE PROCEEDINGS BELOW.

A. The cross-examination of the witness Johnston.

There is no merit to appellant's complaint (BR. 9-10) that he was prejudiced by the allegedly improper cross-examination of one of his witnesses, Loretta Johnston. On direct examination, Mrs. Johnston had testified that Lake had loaned money to Grimm and Goutermont and that he was accompanying them and the equipment to Reno only for the purpose of insuring the repayment of these loans after the machine was sold (R. 220). On cross examination of Mrs. Johnston by counsel for the de-

fendant Goutermont, [5] Mrs. Johnston was questioned for the purpose of showing her partiality towards the defendant Lake and her bias against Government witness Grimm who had implicated Lake in the offense charged (R. 235, 240). It was in this context that defense counsel for Goutermont asked the allegedly objectionable question concerning the stolen property in her home at the time of the break-up of her earlier marriage to Mr. Angel (R. 241). Whether this question was asked to impeach Mrs. Johnston's credibility by prior acts of misconduct or to show an eventual tie-in with Mr. Lake in a similar type of crime to that charged in the instant case is not revealed by the record since the trial court promptly sustained the objection to the question and instructed the jury to disregard it (R. 242). This was a minor incident in the trial, the point was not mentioned again, and the immediate corrective action of the court removed any possibility of prejudice.

B. The Closing Argument of the Prosecuting Attorney.

Appellant asserts (BR. 11-12) that his constitu-

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[5] In his brief, appellant Lake mistakenly states (BR. 9) that the cross examination was by Government counsel.

tional privilege against self-incrimination was violated in the closing argument of the prosecuting attorney as follows (R. 399-400):

> "MR. SEPENUK: (continuing) There is so much other evidence in the record. We don't need this man Lake's testimony to show that Mr. Goutermont is guilty of this offense. We don't need their testimony, because the testimony of these other witnesses proves beyond any doubt, we suggest to you, ladies and gentlemen, that this was a criminal partnership, that the two of them were in here arm and arm; and that this shocking display that you have seen here this afternoon of each man telling diametrically opposed stories, that they are doing the same thing they did after they were arrested. Each is trying to put the blame on the other one, when in fact the blame is joint."

The comments presumably objected to by appellant is the reference of the prosecuting attorney to certain statements made by him after arrest. Appellant makes the same erroneous assumption on appeal as he did at trial, viz: that the prosecuting attorney was referring to post-arrest statements which may have been made to agents of the Federal Bureau of Investigation. To the contrary, as was explained by the prosecuting attorney in a colloquy with the trial court (R. 401-406), the comment in closing argument had no reference to anything said by appellant Lake to federal officers. In fact, no

such admissions or statements were elicited at the trial in view of the trial court's ruling that the voluntariness of such statements, if any, had not been affirmatively established by the Government in a pre-trial hearing (R. 345-346; 401-406). Accordingly, the comment by the prosecuting attorney, as was noted by him in the court below (R. 405-406), was directed to Lake's post-arrest statement to Government witness Grimm when Lake warned Grimm to "Keep (his) mouth shut" and "to say that Mr. Goutermont had hired (Grimm) to drive this truck." (R. 30) This was certainly fair argument by the prosecuting attorney, was solidly based in the evidence, and appellant has no cause to complain.

C. The testimony of the witness Dugger.

At the trial, a Government witness, Donald Dugger, testified on direct examination that he was to sell the compressor for Lake and Goutermont and receive a certain percentage of the proceeds (R. 139-140). After so testifying, the following questions and answers took place on direct examination by the Government attorney (R. 140-144):

> "Q Did you specifically ask Mr. Goutermont about where he had acquired this compressor?
>
> "A Yes, I did, but he didn't say.

"Q Did you ask him whether or not it was stolen?

"A Yes, I did.

"Q And what did he say?

"A He said 'no'.

"Q Is that your recollection now, that he said 'no'?

"A Yes.

"Q Would it refresh your recollection at all if I reminded ——

"MR. HOWLETT: Objection, your Honor.

"THE COURT: Overruled.

"Q (By Mr. Sepenuk) Do you recall making a statement on this point ——

"MR. HERNDON: For the purpose of this record, I want to join in the objection.

"THE COURT: All right. You have joined in the objection, and it is overruled.

"Q (By Mr. Sepenuk) Mr. Duggar, do you recall giving a statement to Special Agent Dempsey and Special Agent Stone of the Federal Bureau of Investigation?

"A Yes.

"Q And have you recently read this statement?

"A Yes. Yesterday.

"Q Right. And is this statement true? The statement that you read.

"A Yes.

"Q Would you mind just looking at it and see if

that refreshes your recollection as to what Mr. Goutermont mentioned to you about the compressor?

* * * * * *

"THE COURT: Now, read that carefully before you make any remarks.

"THE WITNESS: It says—it wouldn't say—

"THE COURT: All right. Now, does that refresh your recollection on anything?

"THE WITNESS: Yeah, Uh-huh.

"THE COURT: All right. How does it refresh it?

"THE WITNESS: How does it what?

"THE COURT: How does it refresh your recollection?

"THE WITNESS: Well he wouldn't say yes or no.

"THE COURT: All right. That is about the stolen property?

"THE WITNESS: Yes, that's right.

"Q (By Mr. Sepenuk) He wouldn't say yes or no; is that correct?

"A Yes, that's right."

At a recess following Dugger's testimony, the Court rejected the objections of defense counsel to this testimony as follows (R. 162):

"THE COURT: We have a couple of matters

> here. Now, on the question of impeachment of the Government's own witness, I will state this for the record: That it was obvious to me that the answer of the witness was a complete surprise to the Government, and that is why I permitted the witness to refresh his memory. So I note your objection. The objection is overruled, and if you have a motion to strike, the motion to strike will be denied."

Appellant claims (BR. 13) that the trial court's holding in this regard violated the general rule that "a party cannot impeach a witness whom he had introduced either in a civil action or in a criminal case where such party is not prejudiced by the testimony because of entrapment, hostility or surprise. 98 C.J.S. 356 & 477." We submit that the District Court's ruling was consistent with this general proposition in that, although no specific claim of surprise was made by Government counsel, the trial court readily observed that the prosecuting attorney was in fact surprised by the answer (R. 162). This Court has noted that the "power to permit impeachment of one's own witnesses lies peculiarly and properly within the discretion of trial judges who can closely observe the witness' behavior on the stand." *Stevens v. United States,* 256 F.2d 619, 622 In the instant case, the witness Dugger had told the prosecuting attorney only the day before he testi-

fied that the matters contained in the statement he gave to the F.B.I. were true, which was reaffirmed by Dugger when he testified (R. 141, 143). Accordingly, the present case is unlike the situation in *Bushaw* v. *United States,* 355 F.2d 477, 480-481 (C.A. 9), where the impeached witness had repudiated her statement prior to trial and there was no legitimate ground for the Government to claim surprise.

Moreover, we note that the prosecuting attorney in the instant case attempted to use the prior statement, not for purposes of impeachment, but in order to refresh the recollection of the witness and to note the apparently inconsistent statements. We respectfully suggest that such a procedure is entirely proper, and supported by respectable and well reasoned authorities. *Di Carlo* v. *United States,* 6 F.2d 364, 366 (C.A. 2—opinion by Judge Learned Hand); *United States v. Allied Stevedoring Co.,* 241 F.2d 925, 932-933 (C.A. 2); *United States* v. *Kahaner,* 317 F.2d 459, 474 (C.A. 2); *United States* v. *De Sisto,* 329 F.2d 929, 933 (C.A. 2); Compare *Stevens* v. *United States, supra,* 256 F.2d at pp. 622-623.

In any event, whether the matter be labeled im-

peachment or refreshment of recollection, appellant has shown no abuse of discretion under the circumstances presented here.

D. The giving of the "Allen" Instruction by the District Court.

After the jury had deliberated for almost one day, the District Court gave the well established supplemental instruction where jurors fail seasonably to agree (R. 429-438). This so-called "Allen" charge, based on the Supreme Court's decision in *Allen* v. *United States,* 164 U.S. 492, 501-502, has been approved on numerous occasions in this and other circuits. See Mathes and Devitt, *Federal Jury Practice and Instructions,* Section 15.16 (and cases cited therein). The propriety of giving this instruction was within the discretion of the District Court, and was entirely proper in this case.

E. The District Court's Instruction Relating to the Inferences to be drawn from Possession of Stolen Property.

Appellant complains (BR. 14-17) that the District Court erred in instructing the jury it could infer from possession of property recently stolen that the defendant knew that it was stolen if such possession was not satisfactorily explained (R.411). This charge,

which has long been judicially sanctioned in this Circuit (*Corey* v. *United States*, 305 F.2d 23), "has its genesis in human experience" and "is not a rule conveniently concocted by judges to fill gaps in the proof." *Morandy* v. *United States*, 170 F.2d 5. The charge was clearly correct.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction should be affirmed.

SIDNEY I. LEZAK
United States Attorney
District of Oregon

NORMAN SEPENUK
Assistant United States Attorney

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

Date: day of December, 1966.

NORMAN SEPENUK
Assistant United States Attorney

No. 21180

In the

United States Court of Appeals

For the Ninth Circuit

C. H. LEAVELL & COMPANY, a Texas corporation, and RIVER CONSTRUCTION CORPORATION, a Delaware corporation, a Joint Venture, and ALLISON STEEL MANUFACTURING CO., an Arizona corporation,

Appellants,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a California corporation,

Appellee.

Petition for Rehearing

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MAR 20 1967

No. 21180

In the

United States Court of Appeals

For the Ninth Circuit

C. H. LEAVELL & COMPANY, a Texas corporation, and RIVER CONSTRUCTION CORPORATION, a Delaware corporation, a Joint Venture, and ALLISON STEEL MANUFACTURING CO., an Arizona corporation,

Appellants,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a California corporation,

Appellee.

Petition for Rehearing

Appellee respectfully requests that the Court grant rehearing in the above captioned matter on the following grounds:

1. This court has overlooked or has erroneously interpreted the findings and conclusions of the trial judge concerning the nature of the actions by Allison's employees which resulted in the loss, and has thereby characterized the intentional alteration and change in the general method of construction as being a mere act of negligence on the part of Allison's employees. The Court's attention is respectfully directed to Finding of Fact No. 15 (T.R. 37), the most important portion of which was omitted from the opinion:

"15. Why the workmen did not follow the proper procedures and use the proper method in attempting to position this wind boom cable has not been established. *Either these workmen had not reviewed the required erection procedures in this instance or 'took a chance' thereby avoiding the extra work required in going to the top of the tower, disengaging the block and tackle from the top of the derrick and re-attaching it to the corner of the tower at the top of the tower.*" (Emphasis added to indicate portions omitted from opinion)

Based upon the foregoing Finding of Fact, the trial court correctly concluded as follows:

"The Court is of the view that this loss occurred during a period of time when the policy was not in effect because the use to which the derrick was put to lift the wind boom cables constituted a material alteration or change in the method of construction. It was agreed by the parties that the derrick as designed by Allison was intended to be used only for lifting and moving the main cables and was not designed for use in lifting and placing the wind boom cables. To say that the workmen's use of the derrick was a fortuitous event or accident is to ignore the plain and unambiguous language of the insurance policy. There are many negligent acts that one may conjecture this policy was intended to cover: loss that resulted from workmen rushing or hurrying to complete the job, slipping or falling while working, a minor alteration in the method of construction, etc." (T.R. 41)

The trial court's conclusion that the damage was not due to a fortuitous event or accident, or mere negligence on the part of the employees, but was instead a material alteration or change in the method of construction is correct and inescapable, based upon the Findings of Fact.

2. This Court has overlooked or erroneously interpreted the pertinent sections of the documents contained in Exhibit 1, which were submitted to Fireman's Fund before it issued the policy. The Court has stated that the exclusion clause of the policy refers to "the general design or method of construction embraced in the plans and specifications prepared by El Paso." (Opinion, page 5)

This Court has referred, however, to only one section of the aforesaid plans and specifications in reaching its conclusion that a departure from the provisions of the subsequently prepared drawings and erection procedure plans did not constitute a material alteration or change in the general method of construction. The Court's opinion fails to take into account the following additional provisions of the documents contained in Exhibit 1, all of which were submitted to Fireman's Fund prior to issuance of the policy.

"Article 1. SCOPE OF THE WORK.

"The Contractor has agreed and does hereby agree to furnish all of the machinery, equipment, plant, tools, transportation, labor, superintendence, insurance, materials and all other requisites for constructing, complete in every detail, a Pipe Line Suspension Bridge across the Flaming Gorge Reservoir located in the State of Wyoming, approximately 12-Mi. Northwesterly from Dutch John, Utah, *in strict accordance with the plans and specifications as prepared by Matthews, Kenan & Edens, Consulting Engineers of San Antonio, Texas, acting as and in these contract documents titled the Engineers, and all other supplemental Specifications and Agreements,* and the Contractor shall do everything required by this agreement and the Contract Documents." (Exhibit 1, Contract Agreement Article 1., Appellee's Supplemental Memorandum, page 1, emphasis added)

* * * * * * *

"Article 4 CONTRACT DOCUMENTS

"The Contract between the parties hereto shall consist of the following documents, each of which is attached hereto and made a part hereof the same as if copied herein:

1. Invitation to Bid
2. The Accepted Proposal
3. This Instrument
4. Performance Bond
5. The Specifications and *any changes and supplements applicable thereto.*
6. The Plans and *any additions, changes and drawings supplemental thereto."*

Exhibit 1, Contract Agreement Article 4., Appellee's Supplemental Memorandum, page 2, emphasis added)

* * * * * * *

I certify that in connection with the preparation of this petition, I have examined Rule 23 of the United States Court of Appeals for the Ninth Circuit, and that in my judgment the petition is well-founded and it is not interposed for delay.

PHILIP A. ROBBINS

Attorney for Appellee

Appellant,

v.

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

- - - - - - - - - - -

MILTON ADOLPHUS FARRELL,

Appellant, :

v. : No. 21182

UNITED STATES OF AMERICA, :

Appellee. :

- - - - - - - - - - -

JURISDICTION

The district court had jurisdiction of this case pursuant to 8 U.S.C., Section 1329, and 18 U.S.C., Section 3231.

After waiver of indictment, an information was filed in the district court charging appellant with a violation of 8 U.S.C., Section 1326, to which he entered a plea of "not guilty", and upon which he was tried, found guilty by jury verdict, and judgment entered against him.

Jurisdiction of this Court on appeal is predicated upon 28 U.S.C., Section 1291.

ARGUMENT

Although appellant's brief does not contain a specification of errors set out separately and particularly, it appears that such a specification would have included the points set forth in the sub-headings of appellant's argument therein and will be treated as such herein.

I.

Appellant first contends that the government failed to prove that appellant's parents were not citizens or nationals of the United States and that the government was thereby precluded from proving that appellant was an alien. It is submitted (1) that the government proved that appellant's parents were not citizens or nationals, and, (2) that appellant was an alien.

In support of his contention, appellant relies on the testimony of his witness Carolina Mouritzen that she could not come to a determination of citizenship from examining Exhibit 1-A, appellant's birth certificate which was received in evidence without objection (Tr. 9). It is apparent from Mrs. Mouritzen's testimony that she was referring to the citizenship of appellant, not that of his parents, as reflected on line 24, page 42, of the transcript where she refers to "the child" designated in such certificate. No questions were put to her concerning the appellant's parents or their citizenship. Inasmuch as appellant's alienage was the paramount issue at trial, it is obvious that she was called to testify on this point and was referring to the appellant's citizenship in testifying about his birth certificate.

Exhibit 1-A on its face shows that appellant's parents were both born in Barbados, British West Indies (Tr. 23). Exhibit

1-B, the order of U. S. District Judge Homer Thornberry of the U. S. District Court for the Western District of Texas, recites that appellant's mother and father were aliens at the time of his birth (Tr. 23).[1/] In Exhibit 1-E, the extra-judicial typewritten statement taken from appellant, he states that both his parents were born in and citizens of the British West Indies (Tr. 28, 29).[2/] Exhibit 1-F, another statement by appellant, contains similar declarations (Tr. 36).[3/] Appellant now contends that these statements by appellant as to his parents' alienage, which were introduced without objection, are incompetent evidence to prove such facts because they are hearsay and conclusions. "The extrajudical statements of a party to the action, civil or criminal, are binding upon him and substantive evidence against him." Gonzales v. Landon, 215 F.2d 955, 957 (C.A. 9, 1954), rev'd. on other grounds, 350 U.S. 920. See also Wong Ken Foon v. Brownell, 218 F.2d 444 (C.A. 9, 1955); IV Wigmore, Evidence, sec. 1050 (1940 ed.). Here the appellant was stating facts as to a matter of pedigree as to his own parents. An alleged alien's own declarations may be admis-

---

1/ The admissibility of Exhibit 1-B is considered in section II, infra.

2/ The admissibility of Exhibit 1-E is considered in section III, infra.

3/ The admissibility of Exhibit 1-F is considered in section III, infra.

sible to establish alienage. 3 C.J.S., Aliens, sec. 3(c). See also Young Ah Chor v. Dulles, 270 F.2d 338, 343-345 (C.A. 9, 1959); United States v. Mid-Continent Petroleum Corporation, 67 F.2d 37, 45 (C.A. 10, 1933), cert. denied, Hosey v. Mid-Continent Petroleum Corporation, 290 U.S. 702.

With respect to the alienage of appellant himself, the government introduced into evidence Exhibit 1-A, the certificate showing appellant's place of birth in the Canal Zone; Exhibit 1-C, the decision of the Special Inquiry Officer concluding that appellant was an alien; Exhibit 1-D, the decision and order of the Board of Immigration Appeals affirming the findings of the Special Inquiry Officer and dismissing appellant's appeal; and Exhibit 3, the copy of a conviction of appellant in the U. S. District Court for the District of Arizona on the same charge which he faced in the present case.

It is submitted that the evidence was clear and uncontradicted that appellant's parents were aliens at the time of his birth and that appellant was also an alien at the times specified in the exhibits referred to directly above. Once established, a person's status as an alien is presumed to continue until the contrary is shown. Hauenstein v. Lynham, 100 U.S. 483, 25 L.Ed. 628 (1880); Ng Kam Fook v. Esperdy, 320 F.2d 86 (C.A. 2, 1963), cert. denied, 375 U.S. 955; United States v. Day,

4 F.2d 336 (C.A. 2, 1931); Mills v. United States, 273 Fed. 25 (C.A. 9, 1921). No evidence whatsoever was introduced r developed by appellant to rebut this presumption. It was herefore not incumbent upon the government, as now contended y appellant, to prove affirmatively that appellant and his arents never became citizens of the United States.

II.

Appellant contends that the lower court erred in receiving nto evidence Exhibit 1-B, the copy of the order by Judge Homer hornberry of the U. S. District Court for the Western District f Texas in a habeas corpus proceeding instituted by appellant. similar contention is made with respect to Exhibit 1-D, the ecision and order of the Board of Immigration Appeals in dep- rtation proceedings involving appellant. The introduction of oth documents was objected to at the trial (Tr. 10, 12) on the rounds of hearsay and lack of authentication thereof. Both ocuments were received by the court as business records of the mmigration and Naturalization Service. Exhibit 1-B was also judicially noticed by the court (Tr. 23).

Both of these documents were produced at trial from Exhibit 1, an Alien Registration File of the Immigration and Naturaliz- ation Service pertaining to appellant.

Exhibit 1 was introduced through the testimony of Mr. Truman LeFors, an investigator for the Immigration and Naturalization Service with thirty years experience in the Service (Tr. 6). He testified that the file was made and kept in the regular and ordinary course of the business of the Service and that such a file was for a person having any material transactions with the Service (Tr. 6). It is obvious that such an Alien Registration file must include all documents relating to an alien's immigration, exclusion, deportation, expulsion, naturalization, place of birth, age, race, nationality, citizenship and other items bearing on his status as an alien in order that the Immigration and Naturalization Service can discharge its duties and responsibilities in the administration and enforcement of the immigration laws of the United States. It would of course be necessary to include therein such a document as Exhibit 1-B, a copy of a federal court order adjudicating issues as to an alien's deportability. Without such a document, the alien's actual status could very possibly be quite different than that reflected in his Alien Registration file. Mr. LeFors did in fact testify that Exhibit 1-B was kept in the regular and ordinary course of Immigration and Naturalization Service business (Tr. 9). The fact that the document was not written or prepared by personnel of the Service is not an obstacle to

its reception under 28 U.S.C., Section 1732. See LaPorte v. United States, 300 F.2d 878 (C.A. 9, 1962) (form prepared by person outside the Selective Service System which was in the defendant's draft file held admissible under 28 U.S.C., Sections 1732 and 1733); United States v. Fluckey, 19 F.2d 64 (C.A. 6, 1927) ("landing certificate" made out by steamship company and delivered to immigration authorities held admissible as an official record kept in the due performance of public business).

In addition, Exhibit 1-B was received by the lower court as being judicially noticed (Tr. 23). Such a document may be the subject of judicial notice by a federal court. See Wells v. United States, 318 U.S. 257, 260 (1943) (holding federal court may judicially notice habeas corpus proceedings brought by same petitioner in other federal court); St. Paul Fire & Marine Insurance Co. v. Cunningham, 257 F.2d 731 (C.A. 9, 1958) (this court took judicial notice of records of a California county court and state District Court of Appeal); Lambert v. Conrad, 308 F.2d 571 (C.A. 9, 1962) (holding records of other courts in related proceedings may be judicially noticed); Lopez v. Swope, 205 F.2d 8, 9 fn. 2 (C.A. 9, 1953) (this Court took judicial notice of the official records of the U. S. District Court for the Western District of Washington in an appeal from the Northern District of California); Smith v. Settle, 212 F.Supp. 622 (W.D. Mo. 1962)

(district court took judicial notice of prior published reports and the files and records of cases in which petitioner had figured). It is therefore submitted the lower court did not err in receiving Exhibit 1-B in evidence.

Exhibit 1-D is not a court order as contended by appellant (Appts. Brief, p. 11). It is a copy of a decision and order of the Board of Immigration Appeals which is a part of the Department of Justice directly under the supervision and direction of the Attorney General and established pursuant to 8 C.F.R., Section 3.1. The Board, under subpart (b) of this regulation, has appellate jurisdiction over various decisions and determinations made by officers of the Immigration and Naturalization Service which is also a part of the Department of Justice directly under the supervision and direction of the Attorney General. 5 U.S.C. secs. 342, 342b. Copies of decisions of the Board must be submitted to the Immigration and Naturalization Service. 8 C.F.R., sec. 3.1 (f). Exhibit 1-D is just such a copy. This copy would of course be kept in an Alien Registration file such as Exhibit 1 since the contents thereof would undoubtedly have a bearing on the alien's status. This document is of necessity kept in the regular course of business of the Immigration and Naturalization Service and, it is submitted, is admissible in evidence as a business record under 28 U.S.C., Section 1732.

It was not necessary, as contended by appellant, that Exhibits 1-B and 1-D be authenticated pursuant to Rule 27, Federal Rules of Criminal Procedure, and Rule 44(a), Federal Rules of Civil Procedure, inasmuch as Rule 44(c), Federal Rules of Civil Procedure provides that Rule 44 "does not prevent the proof of official records * * * by any other method authorized by law."

III.

Appellant's final contention is that Exhibits 1-E and 1-F, both of which are typewritten statements taken from appellant by Immigration and Naturalization Service personnel and signed by appellant, were introduced into evidence in violation of appellant's rights under the Fifth Amendment to the Constitution of the United States. Appellant's argument on this point is untenable.

No claim is made by appellant concerning the voluntariness of these statements. Appellant's whole argument is that the statements and the manner in which they were obtained do not satisfy the strict requirements laid down by the Supreme Court of the United States in Miranda v. Arizona, 384 U.S. 436 (1966). However, subsequent to the Miranda decision, the Supreme Court, in Johnson v. New Jersey, 384 U.S. 719 (1966), held that the guidelines set forth in Miranda are not applicable to cases

the trial of which began prior to the date of the decision. Since Miranda was decided on June 13, 1966, and the trial of the case at bar began and was concluded on January 28, 1966, the Miranda requirements are not applicable and appellant's argument must fail.

This Court has recently recognized the inapplicability of Miranda in such situations: McCarrity v. Wilson, 368 F.2d 677 (C.A. 9, 1966); Collins v. Wilson, 368 F.2d 995 (C.A. 9, 1966); Doran v. Wilson, 369 F.2d 505 (C.A. 9, 1966); Spigner v. United States, 369 F.2d 686 (C.A. 9, 1966).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted this 14th day of February, 1967.

EDWIN L. MILLER, JR.
United States Attorney for the
Southern District of California

Arthur W. Ayers, Jr.

ARTHUR W. AYERS, JR.
Special Assistant to the United States Attorney for the Southern District of California

ATTORNEYS FOR APPELLEE

C E R T I F I C A T I O N

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Arthur W. Ayers, Jr.

ARTHUR W. AYERS, JR.
Special Assistant to the United States Attorney for the Southern District of California

FOR THE NINTH CIRCUIT

LTON ADOLPHUS FARRELL,

Appellant,

-vs-

ITED STATES OF AMERICA,

Appellee.

No. 21161

AFFIDAVIT OF SERVICE BY MAIL

TED STATES OF AMERICA)
) ss.
UTHERN DISTRICT OF CALIF.)

Dorothy V.Weir, being first duly sworn,

poses and says:

That she is a citizen of the United States and a resident San Diego County, California; that her business address is 5 West "F" Street, San Diego, California; that she is over e age of eighteen years, and not a party to the above-titled action;

That on February 14, 1967 she deposited in the ited States Mails, San Diego, California, in the above-ntitled action, in an envelope bearing the requisite postage, copy of APPELLEE'S BRIEF

ddressed to Mr. Frederick Barak, Attorney at Law 800 No.Highland Ave.,Hollywood Calif. 90028 last known address, at hich place there is a delivery service by United States Mails rom said post office.

UBSCRIBED and SWORN to before me, [illegible]

his 14th day of February, 19 67.

ILLIAM W. LUDDY, Clerk, U.S.District Court
outhern District of California

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LLOYD L. MOTT,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 21,188

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

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Attorneys for Appellee

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SEP 18 1967
WM. B. LUCK, CLERK

SEP 18 1967

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LLOYD L. MOTT,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 21,188

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

I.

JURISDICTIONAL STATEMENT OF FACTS

On March 16, 1966, an Indictment was returned by the Federal Grand Jury sitting at Tucson, Arizona (Transcript of the Record, Volume I, Item 1). (Hereinafter Volume I of the Transcript of Record will be referred to as "RC," Volume II of the Transcript of Record, i.e., the Reporter's Transcript, will be referred to as "RT", the number following will refer

to the page and the number following "L" will refer to the line. Appellant will be referred to as Mott.)

The Indictment charged Mott with having conspired from on or about February 22, 1966, and continuing thereafter until on or about February 24, 1966, in the District of Arizona, at Lukeville, Arizona, at Ajo, Arizona, and elsewhere, together with Leticia Carrasco-Saavedra, who was named as a conspirator but not as a defendant, and various other persons whose names are and were unknown to the Grand Jurors, and that they did wilfully and knowingly combine, conspire, confederate and agree together to violate Section 176a of Title 21, United States Code; that it was a part of said conspiracy that Mott would fraudulently and knowingly import and bring approximately 542 pounds of marihuana into the United States of America from Mexico, contrary to law; that it was a further part of said conspiracy that Mott would wilfully and knowingly receive, conceal, buy, sell, and facilitate the transportation, concealment and sale of approximately 542 pounds of marihuana, after the said marihuana had been imported and brought into the United States of America, knowing the same had been imported and brought into the United States of America contrary to law; that it was a further part of the conspiracy that Mott would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of his activities; that in furtherance of the conspiracy and to effect the objects thereof, the following overt acts were committed:

> "1. That on or about the 22nd day of February, 1966, the said Defendant ROGER COLLINS, also known as LLOYD LESLIE MOTT and also known as LLOYD L. MOTT, did hire a taxi in Ajo, Arizona, to take him to the border at Lukeville, Arizona.
>
> "2. That on or about February 22, 1966, the said Defendant ROGER COLLINS, also known as LLOYD

LESLIE MOTT and also known as LLOYD L. MOTT, did meet with Leticia Carrasco-Saavedra at Room No. 5 of the Ajo Motel, Ajo, Arizona.

"3. That on or about February 23, 1966, the said Defendant ROGER COLLINS, also known as LLOYD LESLIE MOTT and also known as LLOYD L. MOTT, did park his vehicle, a 1960 El Camino Chevrolet automobile, California license No. L50-351, on Highway No. 85, approximately six miles North of Ajo, Arizona, at about 2:00 o'clock p.m., and did enter a vehicle driven by Leticia Carrasco-Saavedra.

"4. That on or about February 24, 1966, the said Leticia Carrasco-Saavedra entered the United States of America at Lukeville, Arizona, driving a 1960 blue El Camino Chevrolet automobile, bearing California license No. R54-962." (RC Item 1)

On March 21, 1966, Mott, represented by retained counsel, pleaded not guilty (RC Item 9). Trial was set for May 27, 1966 (RC Item 9). Trial was held on May 27, 1966, Chief Judge James A. Walsh presiding, and the jury returned a verdict of guilty (RC Item 2). On June 1, 1966, Mott filed a Motion for New Trial (RC Item 9).

On June 6, 1966, the Motion for New Trial was denied, judgment of conviction was entered, and Mott was sentenced to ten years (RC Item 3). On the same date, the Court found Mott to be in forma pauperis and entered an Order that the Appeal may proceed in forma pauperis (RC Item 9).

On June 8, 1966, the Notice of Appeal was filed (RC Item 4).

This Appeal is pursuant to 28 U.S.C.A., § 1291.

II.

STATEMENT OF FACTS

Paul Colarich, a resident of Ajo, Arizona, was the owner of a retail home and auto supply service station and taxi franchise (RT 17 L 10-17). On February 22, 1966, at about 8:15 a.m., Mott came to his place of business and inquired about obtaining a taxi for a trip to Lukeville, how to obtain the cab, and the time involved (RT 18 L 5-9). Mott left, but phoned in about fifteen minutes and requested the cab to come to Number 5 at the Ajo Motel (RT 18 L 13-21).

Mott had a vehicle when he came to Colarich's place of business (RT 20 L 23-25). It was a blue Chevrolet El Camino with California plates (RT 21 L 1-4). Colarich had the driver bring the taxi in to be checked prior to making the trip and then called the Sheriff's Office (RT 18-19).

Theresa Dolson, the owner of the Ajo Motel in Ajo, Arizona, identified Mott as Roger Collins, who registered (Government's Exhibit 1 in Evidence) into Room 5 of the Ajo Motel at about 8:30 a.m. on February 22, 1966, and who, in about fifteen minutes, had her summon a taxi for him (RT 21-23). Mott was driving a blue ranch wagon with California license number L50-351, which was described on the Ajo Motel registration card (RT 23 L 13-16).

Joan LeGendre, the taxi driver employed by Paul Colarich, picked up Mott at Room 5 of the Ajo Motel and drove him to Lukeville, Arizona, which is approximately forty-two miles from Ajo on the Mexican Border (RT 29-32). On the way he talked of opening an electrical shop in Ajo (RT 31). Mott stated he had never been to Mexico before (RT 32). They arrived about 10:00 a.m. (RT 32 L 17-18). Mrs.

LeGendre let him off near a little grocery store on the American side (RT 32 L 12-15). On her way back to Ajo she was stopped by Lt. Tom Cromwell about two miles North of Lukeville, and she talked to him concerning her passenger (RT 32 L 22 to 33 L 7; 71 L 18-20).

Willis Ramsey, a U. S. Customs Inspector, recalled a man asking permission to enter Mexico, and shortly thereafter Lt. Tom Cromwell of the Sheriff's Office arrived and questioned him concerning this man (RT 61 L 1-16; 71 L 21 to 72 L 8).

At approximately 4:30 p.m. on February 22, 1966, Leticia Saavedra drove a blue El Camino Chevrolet with California plates into Carney Motors in Ajo, Arizona, to have it repaired (RT 33-35). She asked Virgil Downey to drive her to the Ajo Motel and he did (RT 35). He described her as having black hair, dark complexion, etc., (RT 35 L 16-19).

At about 5:00 p.m. Mrs. Dolson saw a young woman with dark hair (RT 28 L 17-20) alight from a truck from the garage in town and go into Room 5 at the Ajo Motel (RT 24 L 13-16). Later Mott went into the motel office to ask Mrs. Dolson what the check-out time was, and Mott informed her he had to leave that evening, but would be back to get his things the next morning (RT 24 L 23 to 25 L 3). Lt. Cromwell followed Mott, who left the Motel that evening in his blue El Camino proceeding North on the highway toward Gila Bend; Cromwell stopped following Mott at the county line (RT 73 L 1-25).

On the following day, February 23, 1966, Deputy Sheriff Carlton Oglesby saw Leticia Saavedra in downtown Ajo, and she spoke to him, asking for information (RT 43-45). Later that day, at about 1:00 p.m., Oglesby passed Saavedra, who was in a black '53 or '54 Chevrolet on Highway 85 headed North (RT 45-46). Oglesby met Cromwell and Border Patrol-

man Chuck Seaver on Highway 85 about four miles North of Ajo (RT 46). Oglesby, traveling in an unmarked car, saw this car parked next to a blue El Camino on the South side of Airport Road, which was off of Highway 85 (RT 46-47). Oglesby could recognize Saavedra in the driver's seat, but could not see the passenger clearly enough, except that he could see it was a man (RT 47).

Lt. Tom Cromwell, who had been alerted that Mott had checked out of the motel, with the Border Patrol Officer, had seen Mott in a blue El Camino turn off of Highway 85 and go down Airport Road (RT 74-75; 64-65). When Mott made a sudden U-turn, they did also; Cromwell and Seaver returned to the highway and waited for Oglesby, whom Cromwell had summoned by radio (RT 65 L 14-16; 75). They saw Saavedra in the black '53 or '54 Chevrolet turn off on to Airport Road (RT 65). Oglesby, as described above, saw the two cars and reported it by radio to them. Cromwell and Seaver left the area and went to a point eleven miles South of Ajo, which was on the highway leading to Lukeville (RT 77; 65). They saw Leticia Saavedra pass in the black '53 or '54 Chevrolet and followed her at a distance and eventually saw her enter Mexico at Lukeville (RT 65-66; 77-78).

Oglesby had seen the blue El Camino leave Airport Road and head North on Highway 85 in the direction of Gila Bend (RT 48).

On the following day, February 24, 1966, Lt. Tom Cromwell received a radio call at about 9:30 in the morning from the Border Patrol in Gila Bend, and as a result of that radio call, sent Mr. Johnson Payne, Chief of Security at the Phelps Dodge Smelter, who had an unmarked car, but which was equipped with a radio, to the area on Airport Road where Saavedra and Mott had met the day before (RT 81-82; 86-87).

Payne approached the area from the other direction, sighted the El Camino, and radioed back to the Sheriff's Office (RT 82; 86-87). Payne identified Mott as the man he saw in the parked El Camino (RT 87 L 20-24). Cromwell later sent a deputy to see if Mott was still parked there (RT 82).

At approximately 10:30 a.m. that same morning Leticia Saavedra entered the United States from Mexico in a blue El Camino with California license number R54-962 (RT 52). The El Camino was searched and 249 packages, containing 542 pounds of marihuana, were removed from the El Camino's side panels, from behind the driver's seat and from beneath the truck bed (RT 52-55; 59-61); the amount and contents of the El Camino were stipulated to by Mott (RT 100-101).

Some time that day Mott checked with Mrs. Dolson if he had had any messages (RT 26 L 15-18).

Mott was arrested at about 1:30 that afternoon in Gila Bend, Arizona, which is some forty miles from Ajo (RT 63).

Customs Agents from Nogales, which is approximately 225 miles from Lukeville, were summoned there and took custody of Leticia Saavedra and took her to Gila Bend (RT 102-103). They parked outside Border Patrol Headquarters, and Mott came out of the building in the custody of Customs Agents (RT 103). Saavedra, on seeing Mott, started crying and nodded her head (RT 103).

Customs Agent Henry Washington identified paint samples and samples of the upholstery of the two El Camino's, Government's Exhibits 2 and 5 (RT 105). The cars were identical, except for the license numbers, but both cars had California plates (RT 106).

Lukeville is a small town of some thirty people and is in an isolated area (RT 52). Customs Inspector Wolford knew

Leticia Saavedra as a Mexican alien who frequently entered the United States at Lukeville and who frequently drove a black '53 or '54 Chevrolet (RT 53; 56).

III.

OPPOSITION TO SPECIFICATION OF ERROR

The refusal to grant Appellant's Motion for Judgment of Acquittal on the ground there was not independent proof of the conspiracy was not error.

IV.

ARGUMENT

Once there is sufficient evidence to establish a conspiracy, evidence of a defendant's connection with it may be slight.

Appellant argues in his Brief that there was no proof *aliunde* of the existence of a conspiracy, citing cases and among them *Hitchman Coal and Coke Company v. Mitchell,* (1917), 245 U.S. 229, 38 S.Ct. 65, 62 L.Ed. 260. The Supreme Court held at page 249 that acts of other conspirators can be used to establish a conspiracy, but not the illegality of it. As the Court stated at the time the evidence was being offered of the seizure of the marihuana at page 54 of the Reporter's Transcript:

> "THE COURT: Well, for the record the Court feels the foundation has been established, and the objection is overruled."

Evidence of a conspiracy must perforce be mainly circumstantial. *Diaz-Rosendo v. United States,* (9th Cir., 1966),

357 F.2d 124, at p. 129. Once a conspiracy is established little evidence is needed to connect the defendant to it. *Diaz-Rosendo v. United States,* supra, at p. 130.

As the Court stated in denying Mott's Motion for Judgment of Acquittal, after pointing out Mott's use of a false name, Roger Collins, at page 113 of the Reporter's Transcript at lines 4 through 21:

> "THE COURT: Well, he's down in this remote area, he's engaged in these meetings with this young citizen from the Lukeville area who has passed in and out of the United States before. There's this remarkable two coincidents of two almost identical automobiles, there's the visit at his motel, the meeting the next day on the Airport Road where they're together, clandestinely, then there is the circumstances of his being in possession of one of the vehicles at a point within the United States and her coming into the United States in the other, one of the vehicles, the one that she's bringing in has a secret compartment, it almost cries out that there's an arrangement to swap vehicles when she gets into the United States and let her return with the other.
>
> "You don't have to show that people met or agreed, you don't have to have a witness that heard them say, 'We'll do this, we won't do that.' Conspiracy may be shown by circumstances, and I think it's clearly shown here. I think the jury can very readily find it."

The Court, in instructing the jury, stated at page 127 of the Reporter's Transcript:

> "A conspiracy is a combination of two or more persons by conserted action to accomplish some unlawful purpose. Thus a conspiracy is a kind of partnership in criminal purpose in which each member backs the acts of the other member. The gist of the offense is a combination or agreement to violate the law. Mere similarity or conduct among various defendants and the fact that

they may have associated with each other and may have assembled together, discussed common aims and interests does not necessarily establish the existence of a conspiracy. In order to establish proof of a conspiracy the evidence need not show that the parties to the conspiracy entered into any express or formal agrement, or that they directly by words or in writing stated between themselves what an object or a purpose was to be, or the details thereof or the means by which the object was to be achieved. It is sufficient if they in any way or manner or through any contrivance, positively or passively came to a mutual understanding to accomplish a common and unlawful design. In other words, when an unlawful end is sought to be accomplish (sic) and two or more persons actuate it by a common purpose of accomplishing that end, work together understandingly in furtherance of the unlawful scheme, such persons may have been said to have formed a conspiracy.

"One knowing the purpose of a conspiracy may become a member of the conspiracy though he is without full knowledge of all the details of the conspiracy, such as the membership of the conspiracy, the part to be played by each member or the division to be made from the proceeds of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy but happens to act in a way which furthers an object or purpose of the conspiracy does not thereby become a conspirator. The mere fact that an accused may have engaged in the performance of any of the acts charged in the indictment as overt acts would not itself alone authorize a conviction by reason of that fact, but it is necessary to prove that he was a party to the conspiracy before his guilt of the charge can be made out.

"Before a jury may find that a defendant or any other person has become a member of a conspiracy the evidence must show that the conspiracy was formed and that the defendant or other person who was claimed to have been a member knowingly and wilfully participated

in the unlawful plan for the intent to advance or further some object or purpose of the conspiracy. To participate knowingly and wilfully means to participate voluntarily and understandingly and with specific intent to do some act the law forbids as charged in the indictment. So if a defendant or any other person with understanding of the unlawful character of the plan intentionally encourages, advises or assists for the purpose of furthering the understanding or scheme, he thereby becomes a knowing and wilfull participant, a conspirator.

"A person cannot be convicted of guilty participation in a conspiracy on the basis of acts innocent in themselves, unless the proof of the government has convinced you beyond a reasonable doubt that such person had guilty knowledge that what he was doing was in furtherance of the enterprise charged in the indictment.

"A defendant's mere knowledge of the existence of a conspiracy or his approval or acquiescence in the object or purpose of the conspiracy, without an intention or agreement on his part to cooperate to accomplish such object or purpose is insufficient to constitute such person a conspirator.

"In determining whether or not a defendant was a member of a conspiracy, as to that particular element, you must do so without regard to an independence of the statement and declaration of others. In other words, you must determine the membership of the defendant from the evidence concerning his own action, his own conduct, his own declarations, his own statements and his own connection with the acts and conduct of others.

"If and when it appears from the evidence that a conspiracy existed and that the defendant was one of the members, then the acts thereof knowingly done and statement thereof knowingly made by any person likewise a member may be considered by the jury as evidence in the case as to the defendant found to be a member, even though the facts may have occurred in the absence and

without the knowledge of the defendant, provided, of course, that the acts and statements were knowingly done and made during the continuance of the conspiracy and in furtherance of an object or purpose of the conspiracy."

(This quotation does not include all of the Court's instruction on conspiracy.)

It is respectfully submitted this is a correct statement of the law. *Marino v. United States,* (9th Cir., 1937), 91 F.2d 691.

V.

CONCLUSION

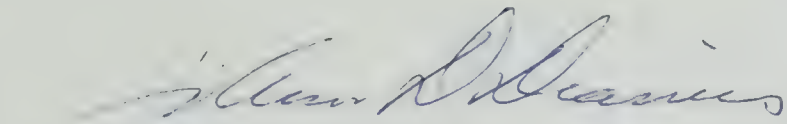
There was sufficient evidence of the conspiracy, and then of Appellant's participation in it, to submit the case to the jury.

Respectfully submitted,

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I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.



JO ANN D. DIAMOS
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Three copies of the within Brief of Appellee mailed this 15th day of September, 1967, to:

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EARNEST PETERSON, Appellant, vs. LAWRENCE E. WILSON, Warden, California State Prison, San Quentin, California, Appellee.	)	No. 21193

APPELLEE'S BRIEF

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EARNEST PETERSON, Appellant, vs. LAWRENCE E. WILSON, Warden, California State Prison, San Quentin, California, Appellee.	)	No. 21193

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court for the Northern District of California, Southern Division, to entertain appellant's application for a writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this court is conferred by Title 28, United States Code section 2253. Proceedings in forma pauperis are authorized by Title 28, United States Code section 1915.

STATEMENT OF THE CASE

A. Proceedings in the State Court

In December, 1961, appellant was convicted in the Superior Court of Los Angeles County upon his plea of guilty to a charge of violation of California Penal Code section

187 (murder); and he was subsequently sentenced to life imprisonment. Appellant did not appeal from the judgment of conviction (TR 2).[1/]

Application for writs of habeas corpus to the Superior Court of Marin County and the California Supreme Court were denied on March 24, 1966, and May 6, 1966, respectively (TR 5, 6).

B. Proceedings in the Federal Courts

Appellant filed a petition in forma pauperis for a writ of habeas corpus in the District Court on June 9, 1966 (TR 1, 8). On the same date, the petition was denied (TR 23-25). On July 1, 1966, Judge Wollenberg granted appellant's application for a certificate of probable cause and for leave to appeal in forma pauperis (TR 26).

STATEMENT OF THE FACTS

The petition filed in the District Court contained the following allegations. On or about January 3, 1961, appellant was arrested on suspicion of robbery (TR 12). Upon arraignment he entered a plea of not guilty and counsel was appointed before the preliminary hearing to represent him on the charge of robbery (TR 13).

Some time subsequent to that preliminary hearing,

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1. "TR" refers to the transcript of record of the proceedings in the District Court.

the appellant, during interrogation by the police, confirmed that a codefendant was correct when he said that a pistol had been obtained from Peter Burns (TR 16). Thereafter, the appellant was charged with suspicion of murder and the robbery charges were dismissed (TR 16). Appointment of counsel for appellant was made at the completion of the preliminary hearing conducted on the charge of murder and appellant was subsequently visited in jail from time to time by counsel (TR 17). Approximately one month before trial counsel advised appellant to plead guilty as it was likely that he might receive a death sentence. In December, 1961, appellant entered a plea of guilty of murder in the first degree; and, as a result, he was convicted and sentenced to life imprisonment in the California State Prison at San Quentin (TR 17).

APPELLANT'S CONTENTIONS

1. The District Court erred in holding that appellant could not raise the issues pertaining to the proceedings, interrogations, etc., in his case before entry of his plea of guilty.

2. The District Court erred in not holding a hearing on appellant's allegations that his guilty plea was coerced.

SUMMARY OF APPELLEE'S ARGUMENT

I. Issues pertaining to evidence obtained through interrogation prior to entry of appellant's plea of guilty may not be raised as grounds for relief by habeas corpus proceedings.

II. The petition stated no basis in fact for finding that appellant's plea of guilty was coerced or that counsel was incompetent.

III. The district court was not required to hold a hearing.

ARGUMENT

I

ISSUES PERTAINING TO EVIDENCE OBTAINED THROUGH INTERROGATION PRIOR TO ENTRY OF APPELLANT'S PLEA OF GUILTY MAY NOT BE RAISED AS GROUNDS FOR RELIEF BY HABEAS CORPUS PROCEEDINGS.

Appellant alleges that he was denied legal representation by the police during interrogation in violation of his constitutional rights. The facts indicate that appellant was questioned prior to the preliminary hearing on the charge of murder and the only statement made by him during that period was that a codefendant was correct when he said a pistol had been secured from Peter Burns (TR 16).

Regardless of whether that statement constituted a "confession," it is not necessary for the court to determine

counsel. The statement was not used to convict him; his conviction was based upon his plea of guilty. Petitioner's initial plea, closest in time to the statement, was one of not guilty; and there is no evidence that the change of plea was motivated in any way by the statement. In re Seiterle, 61 Cal.2d 651 (1964).

As a result, appellant's conviction rests solely upon his plea of guilty, entered in open court in December, 1961, pursuant to advice of counsel (TR 17) and not upon the alleged illegally obtained evidence. Wallace v. Heinze, 351 F.2d 39 (9th Cir. 1965); Townsend v. Burke, 334 U.S. 736 (1948); Davis v. United States, 347 F.2d 374 (9th Cir. 1965); Harris v. United States, 338 F.2d 75 (9th Cir. 1964). The conviction and sentence which follow a plea of guilty are based solely and entirely upon said plea and not upon any evidence which may have been improperly acquired by the prosecuting authorities. Thomas v. United States, 290 F.2d 696 (9th Cir. 1961).

Therefore, the District Court did not err in holding that appellant could not make evidence obtained through interrogation prior to entry of his plea of guilty a basis for relief by habeas corpus proceedings.

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II

THE PETITION STATED NO BASIS IN FACT FOR FINDING THAT APPELLANT'S PLEA OF GUILTY WAS COERCED OR THAT COUNSEL WAS INCOMPETENT.

The appellant's further allegation that his attorney urged him to plead guilty raises no question as to coercion. There is no foundation in fact in this petition to establish prima facie that the plea of guilty was coerced.

Appellant makes no allegation that the court or prosecutor promised him leniency for pleading guilty to the charge of murder; rather, it appears to have been an intelligent decision by appellant based on the advice of his own counsel who considered the possibility of a death sentence if the case went to trial. In Application of Atchley, 169 F.Supp. 313 (D.C.N.D. Cal. 1958), it was held that even if the public defender had advised a state prisoner to change his plea in the state court prosecution and had informed the prisoner that if this were done he would receive a lighter sentence, such facts would not indicate coercion in the consitutional sense which would entitle the prisoner to release under a writ of habeas corpus in a federal proceeding. See also Cortez v. United States, 337 F.2d 699 (1964).

In a habeas corpus proceeding by a state prisoner on the grounds of inadequate representation by the public defender in a state prosecution, the presumption is that

competent counsel was appointed for the prisoner. Application of Atchley, supra. And where a plea of guilty is entered upon the advice of counsel, as here, the allegation of ineffective assistance of counsel must be of such kind as to shock the conscience of the court and make the proceedings a farce and a mockery of justice. Smith v. United States, 324 F.2d 436, 439-440 (D.C. Cir. 1963). The language of Smith v. United States, 304 F.2d 403, 404 (D.C. Cir. 1962), seems appropriate:

> "This case presents another example of able counsel being vilified and maligned after rendering as effective service as could be rendered in the circumstances of this case."

Appellant's argument concerning competency of counsel appears to be keyed to an alleged lack of evidence to support his guilt; however, he himself states that he was implicated in the murder by the confession of a codefendant (TR 17). Appellant relies on People v. Aranda, 63 Cal.2d 518, 530 (1965) which is not applicable here since it concerns, inter alia, a defendant who denied his guilt and never entered a plea of guilty.

/

/

III

THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT'S PETITION WITHOUT A HEARING

The appellant contends that the district court erred in its denial of his petition due to the fact that no hearing of the matter was ordered, thus denying him the opportunity to obtain the testimony of persons directly involved in the circumstances surrounding his plea of guilty.

The district court found that, "petitioner wishes the court to indulge in probabilities, not in actualities. Mere speculations form an insufficient basis upon which this court may act. Wilson v. Harris, 351 F.2d 840 (9th Cir. 1965)." (TR 24).

A federal district judge may dismiss a habeas corpus petition of a state prisoner without a hearing when, as a matter of law, the facts alleged in the petition do not constitute grounds for relief. Schlette v. People of the State of California, 284 F.2d 827, 834 (9th Cir. 1960). See also Blair v. People of the State of California, 340 F.2d 741 (9th Cir. 1965) and Townsend v. Sain, 372 U.S. 293 (1963). Even though the circumstances as stated by appellant concerning his plea of guilty may be correct, he has failed to state a legal ground for relief by habeas corpus proceedings.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the district court denying the petition for writ of habeas corpus should be affirmed.

DATED: November 10, 1966

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: November 10, 1966

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NO. 21196

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN EARL ALFORD,

Appellant,

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APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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NO. 21196

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN EARL ALFORD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, Southern Division, adjudging appellant to be guilty as charged in a one-count indictment following a non-jury trial.

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2312 and 3231. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was tried under a one-count indictment which also included George Owen Donnelly and Raymond Waxler as named co-defendants. The indictment charged that appellant, Donnelly, and Waxler transported a stolen 1965 Chevrolet Impala vehicle from El Monte, California, through the Southern Division of the Southern District of California, to Tijuana, Mexico, knowing the vehicle to have been stolen [C. T. 2]. 1/

Appellant waived the right to trial by jury on April 19, 1966 [C. T. 3]. The case was severed as to defendant Waxler, and appellant and Donnelly were tried together before United States District Judge Fred Kunzel. The trial commenced on April 19, 1966, and appellant and Donnelly were found guilty as charged on April 20, 1966 [R. T. 6, 162]. 2/

Thereafter, on May 20, 1966, appellant was committed to the custody of the Attorney General for treatment and supervision as a Youth Offender, until discharged by the Board of Parole [C. T. 5]. Appellant thereafter filed notice of appeal [C. T. 6].

1/ "C. T." refers to the Clerk's Transcript, which is Vol. I of the Transcript of Record.

2/ "R. T." refers to the Reporter's Transcript, which is Vol. 2 of the Transcript of Record.

III

ERROR SPECIFIED

The only error alleged by appellant concerns the claim that the evidence was insufficient to sustain the conviction.

IV

STATEMENT OF THE FACTS

On February 20, 1966, a 1965 Chevrolet was missing from the John Fair Plymouth automobile lot in Alhambra [R. T. 10, 13, 70, 90-91]. The vehicle was owned by the John Fair Company. It was on the lot on the night of February 19. The used car manager at the lot noticed that the Chevrolet was missing before 10:00 a. m. on February 20 [R. T. 70, 74, 90-91].

The theft of the vehicle was later reported to the police [R. T. 13, 91]. At the John Fair lot, salesmen were not allowed to take company vehicles home (except for their own demonstration vehicles), and customers were not allowed to take vehicles away in absence of execution of borrowed-car agreements, unless they were accompanied by salesmen [R. T. 76-79].

The Chevrolet was observed in Tijuana, Mexico, by Special Agent Henry A. Webb of the Federal Bureau of Investigation on February 21, 1966. It had the same license number and vehicle identification number as the vehicle missing from the John Fair lot [R. T. 71-73, 120-21, 129-30]. The vehicle then contained an impound sticker showing that it had been sent to that location

(Triple A Garage) by Agent Meza of the Tijuana Police Department on February 20 [R. T. 130].

Agent Meza had sent the vehicle (which he identified by license plate number, a dent in the fender, and clothing in a bag) to the Triple A Garage [R. T. 112-13, 142-45]. He testified that he did this after observing a transaction involving the missing 1965 Chevrolet, a 1956 Checrolet, and four persons -- Waxler, Donnelly, Mrs. Coral Oldham, and one other female [R. T. 105, 108-111]. Waxler testified concerning the same transaction involving the 1965 Chevrolet and the Mexican police [R. T. 56-58].

In reference to the 1965 Chevrolet involved in the transaction, Waxler testified that he saw appellant driving that vehicle in the United States on the night of February 19, 1966 [R. T. 39, 48, 62]. Earlier that evening, appellant Alford, Waxler, Donnelly, and two girls met at a house in El Monte, California, and decided to take a trip to Tijuana [R. T. 39-41].

They left in Waxler's vehicle. They arrived in Alhambra after midnight, and appellant and Donnelly got out of the vehicle, said they had some business to attend to, and told Waxler, "We'll catch you in a few minutes." [R. T. 42, 43, 46]. A few minutes later appellant and Donnelly caught up with Waxler's vehicle. Appellant was then driving the 1965 Chevrolet [R. T. 47-48]. Appellant and Donnelly drove the 1965 Chevrolet from Alhambra to Tijuana, Mexico, appellant driving it about half of the distance [R. T. 46-49, 62].

The John Fair lot was on Valley Boulevard, directly across

the street from a bowling alley. Waxler had left appellant and Donnelly at a bowling alley, which he believed was on Valley in Alhambra, before they returned with the 1965 Chevrolet [R. T. 44-45, 74-75].

Appellant presented no evidence [R. T. 149].

V

ARGUMENT

Appellant was charged with knowingly transporting a stolen automobile in foreign commerce from El Monte, California, to Tijuana, Mexico. There was evidence that appellant drove a 1965 Chevrolet during part of the trip from Alhambra, California, to Tijuana, Mexico [R. T. 46-49, 62]. This would have constituted aiding and abetting under Title 18, United States Code, Section 2, if the vehicle was stolen and appellant had knowledge of the theft and the plan for transportation in foreign commerce.

The testimony of Waxler was sufficient to establish knowledge of the intended trip [R. T. 39-41], when applied in the light of the well-recognized rule that the evidence upon appeal is viewed in the light most favorable to the appellee.

Hiram v. United States, 354 F. 2d 4, 7
(9th Cir. 1965);

Davenport v. United States, 260 F. 2d 591, 598
(9th Cir. 1958), cert. denied,
359 U. S. 909 (1959).

The remaining element (knowledge of the theft) was established by the application of the well-known inference that may be drawn from evidence of possession of recently-stolen property:

> "From the possession of the stolen securities there arises not only an inference which the jury may draw, but a presumption (supra) which must be recognized by the jury that the possessor is the thief. . . . It is a part of the common experience of man that the possessor of goods soon after a theft is the thief."

Booth v. United States, 154 F. 2d 73, 75 (9th Cir. 1946).

This presumption also applies to automobile thefts under the statute involved in the instant case.

Morandy v. United States, 170 F. 2d 5 (9th Cir. 1948), cert. denied, 336 U.S. 938 (1949).

Appellant has not contested the application of the rules of aiding and abetting, nor has he contested the validity of the rule that permits an inference that the possessor of recently-stolen property is the thief. His position rests entirely upon the theory that there was insufficient evidence that the vehicle was stolen by anyone and insufficient evidence that the vehicle in Tijuana was the same vehicle that was alleged to have been stolen.

There was clear evidence that someone stole a 1965 Chevrolet from the John Fair lot in Alhambra. It was on the lot on the night of February 19, 1966, and was missing on the morning of February 20. Salesmen could not take vehicles of this type away

from the lot for their own personal purposes, and customers could not take vehicles away in absence of execution of borrowed-car agreements, unless they were accompanied by salesmen [R. T. 76-79]. The theft was reported to the police [R. T. 13, 91]. Appellant refers to "sloppy practices" at John Fair Plymouth, but appellee can find nothing in the record to support this allegation. Even the reference at trial to alleged "sloppy practices" is not part of the evidence in the record, but is merely an argumentative remark by counsel for co-defendant Donnelly [R. T. 94].

The stolen vehicle was identified by license plate number and engine number [R. T. 71-73]. The vehicle observed by Agent Webb in Tijuana had the same license plate number and same engine number [R. T. 121, 129-30]. At this point it was established that the vehicle was stolen and that someone transported it in foreign commerce. The remaining essential link in the proof is the evidence that the vehicle which was driven by appellant was the same vehicle that Agent Webb observed in the Triple A facility at Tijuana, bearing a sticker showing that it had been sent to that location by Agent Meza of the Tijuana Police Department on February 20 [R. T. 130]. The vehicle that he had sent to that location was the one involved in the transaction involving a 1965 Chevrolet, a 1956 Chevrolet, and four persons, including Waxler, Donnelly, and Mrs. Oldham [R. T. 105, 108-111]. This was the same vehicle that appellant had been driving in the United States [R. T. 46-49, 56-58].

The only remaining question concerns the identification by

Agent Meza of the vehicle he observed in the Triple A facility (identified in part by the same license plate number mentioned above, R. T. 142-45) as being the vehicle involved in the two-Chevrolet incident observed by Agent Meza and Waxler. Agent Meza testified that it was the same vehicle. He identified it by license plate number, a dent in the fender, and clothing in a bag [R. T. 142-145]. His testimony is supported by the testimony of Agent Webb, who saw Agent Meza's impound sticker upon the stolen vehicle at the Triple A facility [R. T. 121, 129-30]. Thus, it was clearly established that the vehicle that was stolen was the one driven by appellant and also was the one that was seen in Mexico.

This Court has held that the identity of a vehicle may be established by license plate number:

> "Appellant's contention that the vehicle was not sufficiently identified is untenable. The California license plates found among appellant's belongings matched the plate numbers which the Avis rental agent testified were on the Ford when it was rented."
>
> Bouchard v. United States, 344 F. 2d 872, 876 (9th Cir. 1965).

In Morandy, supra, evidence of identity was sufficiently established by motor number, and the motor number that was presented to the jury was incomplete (at pp. 5-6). In the instant case, identity was established by identification number (Agent Webb's testimony) and license plate number (testimony of both

Agent Webb and Agent Meza).

An automobile may be identified by the number stamped upon it by the manufacturer.

52 C.J.S. 938 (Section 116c.)

Of the cases cited by appellant, only two are concerned with the question of identity of vehicles. These are Cox v. United States, 96 F.2d 41 (8th Cir. 1938), and Thompson v. United States, 334 F.2d 207 (5th Cir. 1964).

Cox apparently involved a total lack of proof that the stolen vehicle was the same vehicle that was transported. Unlike the facts of the instant case, the opinion indicates that the identification was limited to model, type, and style.

Thompson, supra, involved serial numbers that were similar but not identical:

Stolen Vehicle: 01837 L 123003

Transported Vehicle: 10837 L 123003

Should the opinion be interpreted as holding that evidence of identical serial numbers would be insufficient to establish identity, the decision would lack consistency with this Court's rulings in Bouchard and Morandy, supra, involving lesser degrees of proof. However, it is not necessary to determine whether Thompson is consistent with the rulings in this Circuit, because the instant case involves identification by engine number as well as license plate number.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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No. 21204

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT B. BRADFORD, *et al.*,

Appellants,

vs.

MAC L. SHERWOOD, *et al.*,

Appellees.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANTS' OPENING BRIEF.

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No. 21204

IN THE

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FOR THE NINTH CIRCUIT

ROBERT B. BRADFORD, *et al.*,

Appellants,

vs.

MAC L. SHERWOOD, *et al.*,

Appellees.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANTS' OPENING BRIEF.

Introductory Statement.

This is an action to enjoin members of the California State Highway Commission and the Director of Public Works from proceeding in a state condemnation suit to acquire appellees' property for freeway purposes. It is claimed that the taking is in excess of the right-of-way needed and that insofar as a state statute permits such taking to avoid severance damage, such taking is unconstitutional.

Appellees had previously made the same contentions in the state court, but lost at an interim hearing to determine the right to take and its extent. Dissatisfied with the state ruling appellees sought to relitigate the same issue in the District Court by way of injunctive

relief. Because an interpretation of state law preceded the federal question, the trial court abstained to the extent of returning the parties to the state appellate courts to obtain a determination of state statutes by way of an extraordinary writ. No writ issued and no determination by the state appellate courts was forthcoming, whereupon the federal court resumed jurisdiction, interpreted the state law, and found that the appellees had exhausted their state remedies.

The District Court lacked the power to continue in force the temporary injunction staying state court proceedings in violation of 28 U.S.C. 2283 for the purpose of relitigating the previously tried issue.

Additionally, the court below erroneously found as a matter of law that appellees had exhausted their state judicial remedies by virtue of the denial of the writ. There remains the unexhausted remedy of appeal from the condemnation judgment which adequately protects title to the property.

Jurisdictional Statement.

The Court's jurisdiction of this appeal is based on 28 U.S.C. 1292(a)(1).

Statement of the Case.

Eminent domain proceedings were commenced on August 20, 1963 in the state court to acquire all of the property known herein as Parcel 9 for freeway purposes as authorized by a condemnation resolution passed by the defendant commissioners. In that action appellees' predecessors in interest contended that public use did not require the taking of all of Parcel 9 for the freeway. In view of this contention the state court

at a pretrial conference ordered the trial of the public use issue to be heard prior to the jury trial as to compensation.

The public use hearing was continued several times from May 8, 1964 to March 4, 1965. During the interim appellees purchased Parcel 9, filed an answer and also contested public use. [C. T. 42, 43.][1]

On March 4, 1965 the state judge adopted the procedure suggested by appellees' counsel [C. T. 205] and decided the issue of public use on the basis of written briefs and judicial notice of the condemnation resolution. [C. T. 60, 61.] Rejecting appellees' contention the state court on April 5, 1965 ruled:

> "In the matter submitted on previously filed briefs, the court finds: plaintiff has the right and power to condem(n) all of Parcel 9." [C. T. 29.]

Subsequent to the ruling by the state judge but prior to the jury trial set for July 27, 1965, the appellees commenced this action in the District Court to enjoin the appellants, the director and the commissioners, from prosecuting the state court action to the extent such action seeks to take property in excess of the right-of-way for the freeway [C. T. 9, 10] and concurrently moved for a preliminary injunction to prevent the appellants from prosecuting the state condemnation proceeding. [C. T. 15.] The taking in excess of the right-of-way is claimed to be invalid under both federal and state constitutions [C. T. 8] and insofar as such taking is authorized by Section 104.1 of the California Streets and Highways Code the appellees seek to have it declared unconstitutional. [C. T. 9.]

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[1]C. T. refers to Clerk's Transcript.

Appellants opposed the motion for preliminary injunction and moved to dismiss. Because of the shortness of time before the jury trial in the state court the District Judge restrained appellants from proceeding to trial or taking any further action or proceedings in the state court while it considered its jurisdiction. [C. T. 105.]

By memorandum dated October 5 and order of October 8, 1965 the trial court found that jurisdiction was expressly authorized by 28 U.S.C. 1331, continued the temporary restraint in force until further order to give appellees an opportunity to proceed in the state courts through extraordinary writ proceedings [C. T. 141, 142] apparently in recognition of the abstention doctrine.

The appellees were unsuccessful in their attempt to obtain a writ of prohibition in the state appellate courts and requested the District Court to resume the exercise of its jurisdiction. [C. T. 153, 154.]

Subsequently on May 12, 1965 the District Court resumed the exercise of its jurisdiction, found that the appellants had "exhausted" their state remedies (appeal deemed inadequate), and in effect continued the restraint imposed in October pending the exhaustion of extraordinary writ proceedings. [C. T. 229, 230.] This order also contained a ruling by the trial judge that Section 104.1 which authorizes the taking of excess land to avoid severance damages is unconstitutional under Article I, Section 14½ of the California Constitution, the very question which prompted the abstention initially.

Thereafter appellants appealed from the order of May 12, 1966.

Questions Presented.

1. Do Federal District Courts have the power to stay pending state condemnation proceedings while the property owners relitigate an interim ruling made in the latter forum in view of the anti-injunction statute, 28 U.S.C. 2283?

2. Where a claimant has not completely exhausted his state judicial remedies, but has been merely unsuccessful in obtaining extraordinary relief, is he entitled to equitable relief in the federal courts where a controlling question of state law is involved, and appellate review is available after judgment in the state courts?

Specification of Errors.

The District Court erred in:

1. Restraining appellants from proceeding to trial in a pending state condemnation action in violation of 28 U.S.C. 2283, by holding that 28 U.S.C. 1331 expressly authorized such restraint.
2. Concluding that appellees had exhausted their State judicial remedies by unsuccessful application for extraordinary writ.
3. Concluding that appellate review by the State Courts after a condemnation judgment is not an adequate remedy.

ARGUMENT.

Summary.

The trial court's orders raise two essential questions. The application of 28 U.S.C. 2283 (the anti-injunction statute) to 28 U.S.C. 1331 (the federal question statute) and the delicate federal-state relationship that results from their interpretation by the federal courts.

There is little doubt that eminent domain proceedings must proceed in an orderly manner free from unnecessary outside interference, whether that interference initiate from within the state or through the agencies of the Federal Government. It is also clear that in every condemnation proceeding there is the possibility of a constitutional issue under the Fifth and Fourteenth Amendments to the United States Constitution. It is recognized that the federal courts are the protectors of these constitutional guarantees even to the extent of reviewing the decisions of state courts in limited situations. However, the federal courts do not have concurrent jurisdiction with the state courts in condemnation proceedings (except in diversity cases) in spite of the original federal question jurisdiction.

Congress has recognized this difficult situation and has codified its solution in Section 2283 so as to preserve harmony between the two judicial systems. Where state condemnation proceedings are involved, the federal courts have strictly construed this section—and prohibited injunctive relief, even in the face of a constitutional attack on state court rulings.

The federal courts also have evolved a rule based on recognized equitable principles that requires an exhausting of state judicial remedies before injunctive re-

lief will be granted. This rule was ignored in the instant case. The appellees have an absolute right to appeal from any state judgment rendered. The effort required would be hardly more than that expended in this romp through the federal courts which has already delayed the condemnation action for 18 months.

The following authorities demonstrate conclusively that the orderly conduct of state judicial proceedings is preferred to the hasty interposition of the District Court and the added delay such action necessarily generates.

I.

Congress Has Prohibited the District Court From Staying Proceedings in the State Court Except in Certain Specified Cases Not Applicable Here.

The complaint and motion for injunctive relief are aimed at restraining a State condemnation proceeding on the grounds that an interim trial court ruling prior to judgment violated appellees' federal constitutional rights. The District Court enjoined appellants from proceeding to trial stating: "The jurisdiction of the Court having been expressly authorized by 28 U.S.C. 1331, the prohibitions of 28 U.S.C. 2283 do not apply."

The District Court misconceived both code sections.

Section 2283 of Title 28 U.S.C. provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by act of Congress, or where necessary in aid of its jurisdiction or to protect or effectuate its judgments."

There is no judgment to protect in the instant case nor does section 1331 *expressly* authorize an injunction.

The phrase "where necessary in aid of its jurisdiction" has previously been interpreted by the courts adverse to appellees' position. Of course if it were given a broad meaning the section would be a nullity. Therefore the courts have interpreted the phrase narrowly.

> "The phrase, 'where in aid of its jurisdiction', therefore, should be interpreted narrowly, in the direction of federal non-interference with orderly state proceedings. It is even questionable whether the phrase authorizes injunctions to protect jurisdiction of original actions. . . . In any event, it is not, as seems to be asserted here, a mandate to federal courts to hold the line against a possible state invasion of a theoretic concept of federal jurisdiction over a field of law supposedly the exclusive domain of federal courts.
>
> . . .
>
> Further, we think that the broad language of Section 2283 and the policy underlying it are against issuance of a federal injunction to stay state court proceedings even when the subject matter of an action, as federal courts see it, rests exclusively in the federal courts under federal statute."
>
> *T. Smith & Son, Inc. v. Williams* (1960), 275 F. 2d 397, 407.

In the *Williams* case above the state proceeding involved litigation thought to be within the *exclusive* province of the federal courts. Here the District Court's jurisdiction is not exclusive nor is it even concurrent as in diversity cases. Condemnation cases are the special reserve of state courts. (*Louisiana Power & Light Co. v. City of Thibodaux* (1959), 360 U.S. 25, 79 S. Ct. 1070, 3 L. Ed. 2d 1058). The federal courts may

not interfere in such proceedings by injunction even though there is a claimed constitutional violation. (*Baber v. Texas Utilities Co.* (1956), 228 F. 2d 665, 666).

The question of the scope of Section 2283 was before the Eighth Circuit in *Collins v. La Clede Gas Co.* (1956), 237 F. 2d 633 in substantially the same setting as the case at bar. There the property owner sought to stay state condemnation proceedings on the grounds the statute authorizing the acquisition was unconstitutional. The federal suit was filed after the order authorizing the condemnation was issued but before appellate proceedings in the state court were completed. The Court interpreted section 2283 as follows:

> "This court has had occasion to consider the question in the following cases: Evans v. St. Louis Housing Authority, 8 Cir., 226 F.2d 750; Norwood v. Parenteau, 8 Cir., 228 F.2d 148; and National Labor Relations Board v. Swift & Co., 8 Cir., 233 F.2d 226, 230. In National Labor Relations Board v. Swift & Co., supra, answering the contention that the exceptions contained in the statute might be supplemented by implied or judicial exception we said:
>
> > " 'The history, purpose and construction of section 2283 are fully considered by the Supreme Court in the Richman case, supra. The Court states that this enactment revised as well as codified its predecessor, former section 265 of the Judicial Code, and that by the enactment of section 2283 Congress "made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation."

> *" 'Hence, decisions, under the predecessor statute which appear to recognize implied exceptions to the statutory prohibitions need not be considered."* (Emphasis by the Court.)
>
> "As the plaintiffs have not brought their case within any of the statutory exceptions to 2283, Title 28 U.S.C.A., we think this fatal to their right to relief. . . ."

In the landmark case—*Amalgamated Clothing Workers of America v. Richman Bros. Co.* (1954), 348 U.S. 511, 75 S. Ct. 452, 99 L. Ed. 600 referred to in *Collins* and *Williams* the Supreme Court put to rest any lingering doubts that Section 2283 was merely a smoke screen against equitable jurisdiction. There a suit to enjoin a state injunction against peaceful picketing was predicated on 28 U.S.C. 1337 which confers original jurisdiction on federal courts over any civil action arising under any Act of Congress regulating interstate commerce (Taft-Hartley Act).

Justice Frankfurter analyzed Section 2283 as follows:

> "In lieu of the bankruptcy exception of § 265, Congress substituted a generalized phrase covering all exceptions, such as that of the Interpleader Act, 28 U.S.C. § 2381, to be found in federal statutes. Two newly formulated exceptions to the general prohibition deal with problems of *judicial administration* which had earlier been the subject of the series of decisions dealt with in the Toucey Case.
>
> . . .
>
> This is not a statute conveying a broad general policy for appropriate ad hoc application. Legisla-

> tive policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions." (99 L. Ed. 607, 608.) (Emphasis added.)

Congress, therefore, intended the "aid of jurisdiction" exception to apply to those situations where parties attempted to relitigate pending federal case in state courts overruling *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 62 S. Ct. 139, 86 L. Ed. 100, 137 A.L.R. 967, and to prevent conflict where the Federal Courts had *previously* acquired jurisdiction.

The question of whether the exception was expanded to apply to *potential* jurisdiction as in 28 U.S.C. 1651 was also discussed by Justice Frankfurter in footnote 5, 99 L. Ed. at page 610:

> "In any event, it has never been authoritatively suggested that this example of injunctive aid to a potential jurisdiction, which finds roots in traditional concepts of the relationship between inferior and superior courts of the same judicial system, has any relevance where the offending action sought to be enjoined is insulated by two intervening and essentially unrelated systems, one of an administrative rather than judicial nature, the other the mainifestation of a distinct soveriegn authority."

The above cases establish beyond doubt that the District Court has no power to stay state condemnation proceedings even though the plaintiff invokes the original jurisdiction of the court by alleging that the statute authorizing the taking is a violation of the Fourteenth Amendment. In the case at bar appellees invoke the original jurisdiction of the District Court

claiming that the State statute authorizing "excess" taking to avoid severance damage is unconstitutional. This claim under Section 1331 does not automatically put to rest the prohibition of Section 2283 nor does it fall within its exceptions. To say that the requested injunction is in "aid of the jurisdiction" conferred by Section 1331 is to apply a bootstrap theory of jurisdiction without regard to clear Congressional meaning. This the courts have refused to do.

Rosso v. Puerto Rico (1964), 226 F. Supp. 688 is identical. There the District Court recognized the prohibition of Section 2283 and dismissed a complaint for injunctive relief based on a claim that property was not being acquired for a public use in a pending Commonwealth condemnation action.

In the trial court the appellees relied on certain dicta in *Progress Development Co. v. Mitchell* (1961), 286 F. 2d 222 which gave the impression that a state condemnation proceeding could be enjoined under the equitable provisions of the Civil Rights Act (28 U.S.C. 1343 and 42 U.S.C. 1983). This proposition was carefully analyzed by the court in *Green Street Assn. v. Daley* (1966), 250 F. Supp. 139 at page 145:

> "The plaintiffs maintain that Section 2283 is merely the hands-off doctrine referred to as 'comity' and that no proceedings have yet been filed in the State courts. Although the court in *Harrison-Halsted* did not consider this section, the court in *Progress Development* did. In *Progress Development* (286 F.2d 222) it was said, at 232:
>
> '. . . [W]e find nothing in the language of Title 28 U.S.C.A. §2283 which precludes the district

> court from granting equitable relief against defendants Park Board and District in the proper circumstances. This equitable power is also authorized by 28 U.S.C.A. § 1343.'
>
> "However, an examination of the case reveals that proper circumstances are exceptional and that ordinarily no injunction will issue to restrain condemnation where the issue can be raised in the State Court. . . . Further, not even in the *Progress Development* case was the cause remanded to enjoin the State condemnation action which is the relief here sought."

The court went on to deny injunctive relief in the *Daley* case based on the prohibition of Section 2283.

A similar contention was made in the civil rights case of *Sexton v. Barry* (1956), 233 F. 2d 220 an action to enjoin state probate proceedings as violative of the Fourteenth Amendment. The Court's reply at page 224:

> "Appellants' application for injunction plainly does not fall within the first exception of Section 2283, for such relief is not expressly authorized by Act of Congress."

And further at page 226:

> "The Act (Civil Rights) does not create an exception to the general principle that a decision of the state court may not be reviewed by bill in equity in a federal court."

Subsequently, the Seventh Circuit in *Smith v. Village of Lansing* (1957), 241 F. 2d 856 was also asked to in-

terpret the Civil Rights Act as an express authorization sanctioning injunctive relief. The Court refused to distort the plain meaning of Congress at page 859:

> "Title 28 U.S.C. § 2283 prohibits United States Courts from issuing injunctions to stay proceedings in a state court except as expressly authorized by Act of Congress, or where in and of its jurisdiction, or to protect or effectuate its judgments. We hold there is nothing in the Civil Rights Act, Title 42 U.S.C. § 1981 et seq., that suspends or modifies this statute."

Title 28 U.S.C. 1343 is of no comfort to appellees. Even if applicable as a source of original jurisdiction, it is not express authority to interrupt state proceedings, nor does it bring into play the "aid to jurisdiction" exception. (*Sexton v. Barry,* 233 F. 2d at p. 224.)

Cincinnati v. Vester (1929), 33 F. 2d 242 was the only case cited by appellees which enjoined a state condemnation proceeding to determine the constitutionality of the taking. The case was decided prior to the enactment of Section 2283, and no contention was made by the parties that the injunction proceedings violated former Section 265 of the Judicial Code. In light of this circumstance the case is not authority to ignore the prohibition contained in Section 2283.

The granting and continuing of the injunction halting the state condemnation proceeding is clearly violative of Congressional mandate. It must be dissolved.

II.

Appellees Have an Adequate Remedy at Law by Way of Appeal From the State Judgment Which They Have Failed to Exhaust.

It is axiomatic that if a claimant has an adequate remedy at law equity will deny him injunctive relief. The concept of adequate remedy at law includes judicial remedy as well as administrative remedies. Hence, the federal rule that the claimant must exhaust state judicial remedies prior to equitable relief for the deprivation of federal constitutional rights.

Thibodo v. U. S. (1951), 187 F. 2d 249, 256;

Harrison-Halsted Community Group, Inc. v. Housing & Home Finance Agency (1962), 310 F. 2d 99;

Equitable Life Assurance Society v. West (1939), 102 F. 2d 10.

Appellees by legal argument only (no affidavits having been presented) contended that appeal after judgment was not an adequate remedy because of the expenses required, the possibility that the state might take possession of the property pending the litigation [C. T. 29], the delay incident to appellate process [C. T. 29, 30], and the likelihood of unconstitutional treatment at the hands of the California courts. [C. T. 20.]

A. California Courts Are Guardians of Constitutional Rights.

Taking the last of these contentions because of its misconceived clairvoyance[2] and ease of disposition it

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[2]During the preparation of this brief an opinion by the California Court of Appeal, Fifth Appellate District, was filed on Jan-

(This footnote is continued on the next page)

can readily be seen that California courts have as much respect for constitutional protections as other courts. It is obvious beyond cavil that California courts are guardians of due process under the Federal as well as State Constitutions.

Gray v. Hull (1928), 203 Cal. 306, 317-318;
Mulkey v. Reitman (1966), 64 Cal. 2d 529.

Indeed, the very statute (Streets and Highways Code 104.1) which appellees attack as unconstitutional here was not interpreted by the case which they point to as disregarding constitutional rights, namely, *People v. Lagiss,* 223 Cal. App. 2d 23. [C. T. 30.] The only state statute there involved was section 104.3.

B. The Delay and Expense Incident to Appellate Review Do Not Constitute Irreparable Harm so as to Render This Remedy Inadequate.

The appellees complain that the slowness of the appellate procedure and the expense in pursuit thereof is peculiar to them. It is not. Every litigant who is unsuccessful in the lower courts labors under this burden, as well as the successful.

Is the time-consuming process of appeal from state judgments sufficient to invoke the equitable jurisdiction of the federal court to correct a claimed constitutional error? This question was answered by the Supreme Court in *Georgia v. Chattanooga* (1924), 264 U.S. 472, 44 S. Ct. 369 in the following manner:

> "Its (appellants') contention that the requisite power to condemn has not been delegated to the

---

uary 23, 1967 in the case of *People, etc. v. The Superior Court of Merced County,* holding section 104.1 of the Streets and Highways Code vague and an invalid delegation of power. The case is not final. Counsel for appellants plan to petition for rehearing.

> city involves a consideration of the meaning and proper application of the laws of Tennessee and it is especially appropriate that Tennessee courts shall first decide that question. . . . If the decisions of that court shall deny to Georgia any rights secured to it by the constitutional laws of the United States, the case may be brought here for re-examination and review. . . ." (264 U.S. at pages 483, 484.)

Thus appeal, even to the highest Court in the land with all its attendant delay, is an adequate remedy to correct constitutional wrongs.[3] Indeed, its very existence forecloses federal equitable jurisdiction.

> "The condemnation proceedings now pending in the state court are vigorously attacked by bill for injunction in the District Court as violative of due process of law and contrary to the Fourteenth Amendment.
>
> "The plain answer is that the state courts are as firmly bound by the Constitution of the United States as is this Court, and appellants' forum for the enforcement of any constitutional rights that may have been violated is in the Texas state courts with the right of ultimate determination by the Supreme Court of the United States. . . ." (*Baber v. Texas Utilities Co.* (1956), 228 F. 2d at p. 666).

In accord, *Combs v. Illinois State Highway Comm.* (1955), 128 F. Supp. 305, an action before a three

---

[3]Delay is, of course, a relative term in the judicial process. This case has been pending in the District Court since June 18, 1965. The condemnation case has been pending in the state court since August 20, 1963, due to the prior delay caused by the condemnees in that action and the injunction here.

judge court to declare the Tollway legislation unconstitutional where no state court action was pending.

In *Gulf Oil Corp. v. Corp. Commissioner of Oklahoma* (1956), 147 F. Supp. 640, a three judge court rejected Gulf's contention that appeal to the Oklahoma Supreme Court was not adequate. Even though Gulf may have exhausted its administrative remedies, it was required to exhaust judicial remedies prior to the acceptance of equitable jurisdiction by the federal court.

The underlying policy of the above cases can best be illustrated by Justice Frankfurter (*Amalgamated C. W. of A. v. Richman Bros., supra,* 99 L. Ed. at page 609):

> "The assumption upon which the argument proceeds is that federal rights will not be adequately protected in the state courts, and the 'gap' complained of is impatience with the appellate process if state courts go wrong. But during more than half of our history Congress, in establishing the jurisdiction of the lower federal courts, in the main relied on the adequacy of the state judicial systems to enforce federal rights, subject to review by this Court. With limited exceptions, it was not until 1875 that the lower federal courts were given general jurisdiction over federal questions.
>
> . . .
>
> "Misapplication of this Court's opinions is not confined to the state courts, nor are delays in litigation peculiar to them. To permit the federal courts to interfere, as a matter of judicial notions of policy, may add to the number of courts which pass on a controversy before the rightful forum for its settlement is established. A district court's assertion of equity power or its denial may in turn

> give rise to appellate review on this collateral issue. There may also be added an element of federal-state competition and conflict which may be trusted to be exploited and to complicate, not simplify, existing difficulties."

The instant case is proof of the penetrating incite above described. The interposition of the federal court in the state proceedings has served to complicate rather than simplify each party's search for a solution to the problem of state statutory construction within federal and state constitutional framework. We now have two differing interpretations of the same statute and also an appeal on a collateral issue. The competition has already been exploited to the extent of giving birth to two conflicting trial court rulings on the same issue.

The complaint that pursuit of the judicial remedy of appeal will result in unrecoverable expenses was quickly disposed of by the Supreme Court in *Petroleum Exploration v. Public Service Commission of Kentucky* (1938), 304 U.S. 209, 58 S. Ct. 834, 82 L. Ed. 1294 at page 1303:

> "The situation is still controlled by the abiding and fundamental principle . . . that the expense and annoyance of litigation is a 'part of the social burden of living under government.'"

and further at page 1304:

> "When the only ground for interfering with state procedure is the cost of preparing for a hearing, there is no occasion for equitable relief."

If this were not the rule the detrimental consequences would be obvious, for every remedy involves a cost.

C. Appellees' Title Is Fully Protected Pending Appeal in the California Appellate Courts Even Though the State May Take Possession of the Right-of-Way for Highway Construction.

Apparently the court below was unduly fearful that state appellate review was too late to be beneficial to appellees, as demonstrated by the following characterization:

> "Appellate review available in the State Forum will be after the decision of the case on the merits, at which time their property will have been condemned so that they will in effect be in the position of one attempting to lock the barn door after the horse is gone." [C. T. 140, see also C. T. 229-230.]

This concern apparently developed from appellees' argument that the condemnor has the power to take possession of the property pending litigation in the state court, and that the litigation itself constitutes a "cloud" on the entire property. [C. T. 29.]

It is true that the condemnor may take possession of the *right-of-way* before judgment and final order. Code of Civil Procedure, Section 1243.5. But this section does not affect lands outside the right-ofway. Sections 1254 and 1257 also permit possession after judgment pending appeal upon the posting of adequate security so as not to retard the contemplated improvement. Orders based on the latter sections are appealable. (*San Francisco Unified School District v. Hong Mow* [1954], 123 Cal. App. 2d 668) and are made to safeguard the property owner. (*People v. Loop* [1958], 161 Cal. App. 2d 466, 473.)

Furthermore, where the right to take is contested possession may be denied pending appeal, so long as the construction of the highway is not retarded. (*Housing Authority of Oakland v. Superior Court* [1941], 18 Cal. 2d 336.) The lands which appellees claim are outside the right-of-way would not be included within the order of possession.

Finally, an appeal in a condemnation case stays satisfaction of judgment so that legal title does not vest in the condemnor until the appellate process is complete and judgment is final. (*City of Los Angeles v. Oliver* [1930], 110 Cal. App. 248, 258.)

Appellees could not possibly be prejudiced by going to judgment and pursuing appellate review. California statutory safeguards protect them every step along the way. The trial court's conclusion that appellees' property will have been condemned so that they have no appellate remedy misconceives California law. In light of the above protections appellate review is adequate to foreclose equitable relief here.

D. Discretionary Application of the Abstention Doctrine Is No Substitute for the Rule Which Requires That Claimants Exhaust State Judicial Remedies Before Invoking the Equitable Jurisdiction of the District Court.

The District Court by analogy to the case of *Allegheny County v. Frank Mashuda Co.* (1959), 360 U.S. 185, 79 S. Ct. 1060, 3 L. Ed. 2d 1163, abstained from exercising its jurisdiction pending submission of a previously uninterpreted statute (104.1) and state constitutional provision (Art. I, Sec. 14½) to the state courts. The court below confused the abstention doctrine with the equitable rule requiring the claimant to exhaust his state judicial remedies. [C. T. 141.]

The abstention doctrine does come into play when the interpretation of a state statute precedent to the federal question is involved. In applicable cases the District Court has discretion to abstain even though it has jurisdiction.

Interestingly, the doctrine achieved fruition in the *Mashuda* case, *supra,* and *Louisiana Power and Light Co. v. City of Thibadoux* (1959), 360 U.S. 25, 79 S. Ct. 1070, 3 L. Ed. 2d 1058, decided on the same day. Both cases were diversity condemnation proceedings over which the District Court has original concurrent jurisdiction with state courts. Neither case involved an injunction to stay state court proceedings. (In *Mashuda,* injunction was abandoned by the owner.)

In *Thibadoux* the Supreme Court *required* not merely sanctioned the District Courts' "exercise of their discretonary power to stay (their own) proceedings pending the submission of the state determination" where state law is unclear. (3 L. Ed. 2d 1061.)

However, in *Mashuda,* the state law was not subject to differing interpretations regarding public use as presented, and the District Court was required to exercise its diversity jurisdiction, but not its equitable power to stay state condemnation proceedings. (360 U.S. at p. 190.)

Abstention then as the term has been used in these recent decisions signifies that a federal court may either decline or postpone to exercise its jurisdiction where a case involves a controlling question of state law. It does not supplant the traditional concept that a claimant must exhaust his state judicial remedies before he may apply for *equitable* relief. Nor does it justify a discre-

tionary application of the doctrine as a means to avoid the mandate of 28 U.S.C. 2283.

In the instant case the District Court should have dismissed rather than employ the procedure suggested in the *Thibadoux* case which is reserved for diversity cases where no action is pending in the state court and no injunction is requested.

Appellants submit that invoking the abstention procedure adopted by the trial court is no substitute for complete appellate review in the state courts and violates fundamental policies inherent in federal-state relationships.

Conclusion.

The action by the District Court herein clearly violates Congressional prohibitions and equitable principles. Section 2283, referred to as a "pillar of federalism", is completely emasculated by the strained interpretation advocated by appellees and adopted by the trial court. To contend that the preliminary injunction is in "aid of jurisdiction" is to render the statute meaningless.

An acceptance of such a broad interpretation of the exception would destroy the very purpose of the legislation, namely, a Congressional desire to avoid friction between the federal government and the states which necessarily results from the intrusion of federal authority into the orderly process of the states' judicial function.

The judicial power of the District Courts is a limited one. It should not be expanded beyond the intent of the legislation creating such power.

Finally, apart from the anti-injunction statute, appellees have failed to show that they are entitled to equitable relief. Their naked assertions that appellate review in the state courts is slow, late, expensive and fruitless are specious and contrary to announced California statutory and decisional law which is designed to protect the legitimate rights of the property owner in condemnation proceedings. Appellees have an adequate remedy of appellate review in the state courts.

What they seek here is to replace the California appellate courts with the District Court as a court of review passing on claimed errors of the state trial courts. This purpose was partially accomplished by the issuance and continuance of the preliminary injunction below.

Appellants submit that sitting as a board of review to correct errors of the state trial court is not the function of the District Court. The means to accomplish this function should be stopped by dissolution of the preliminary injunction and dismissal of the action.

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ANTHONY J. RUFFOLO

No. 21207

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For the Ninth Circuit

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vs.

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vs.

LARRY P. SMITH, et al., Cross-Appellees,

and

THE AUSTIN COMPANY,
Additional Cross-Appellee as to Count No. 4 only.

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INTRODUCTION*

To serve the convenience of the Court and counsel, we make a joint reply to the Answering Briefs of Smith and Austin. Hence, we are not following the exact format of their briefs but will refer to them in context with the subject matter of this reply.

*As in previous briefs, we are referring to cross appellants as "Hilltop"; and to cross appellees Larry P. Smith, et al., as "Smith", and The Austin Company as "Austin"; and individuals are identified by name where necessary for precise identification.

The briefs on Cross Appeal are designated by initials, i.e., Hilltop's Opening Brief on Cross Appeal, HOB, and Smith's and Austin's Answering Briefs, SAB and AAB respectively. Smith's Appendix to its Opening Brief on Appeal is termed "Smith App."

We commence with the antitrust issues, Count 3 dealing Ohio intrastate, and Count 4, interstate. For simplicity, w clude standing to sue and target area issues of fact and law turn, we discuss "fact" of damage, statute of limitations an terstate commerce. Finally, we deal with the contract issue Count 2, involving economic evidence justifying compensatory ages, being substantially the same facts as alleged in Count for fraud.

ANTITRUST ISSUES
Counts 3 and 4
(Including "standing to sue" and "target area")

(SAB 60-73; AAB 1-37; SAB 1-3)

The factual and legal contentions of Smith and of Austi mind us of a famous expression, "the lethal blow of facts" c late learned John Bassett Moore, an outstanding authority i field of international law.

What are the "lethal" facts here? They are definite a comprehensive. They are simply stated in Hilltop's Content and all reasonable inferences (R. 651-91), and its incorpor references (R. 653, 555-89; see particularly R. 681-9 and 57 The trial court assumed all of these to be true (HOB App. B; R. 829). They are also largely documented in the Admitted a on the fraud and contract counts (R. 1054-1265).

First, Hilltop's Contentions clearly allege that the Mt property was a potential regional shopping center site in the eastern Cleveland suburbs (HOB 7, 52-3). As we have pointed

(HOB 31-58), it fulfilled all the criteria of Smith's standards for a regional shopping center despite Smith's claim of excessive competition (Ex. 29, cover letter; Smith App. 150-1).

Second, the various Smith defendants, and also Austin, in their efforts to "marry the competition" between the Higbee and Halle department stores (Exs. 249*, 251*; R. 567-9, 684-5), deliberately entered into an anticompetitive conspiracy which directly affected Hilltop and the Winslow sisters. For example:

1. Prior to and at their June 11, 1957, meeting in the Statler Hotel in Cleveland, representatives of Smith, Austin and Halle (Ex. 265, p. 88; R. 567-8) continued a conspiracy to "preclude construction of competitive facilities" and keep Severance "dominant" so as to avoid the "risk of a third development taking place" (Ex. 250*, p. 2; R. 568) in the relevant market of Severance in which Nutwood is situated (R. 683, 1188-9, 1191).

2. Prior to that meeting, Austin's representative frankly told Smith that Austin wanted to "control" the meeting and wanted to prevent development of other shopping centers (HOB 9-10). See letter from Beatty of Austin to Treiger dated June 5, 1957 (full text, Ex. 260*, pp. 25-24 from bottom; R. 1118); also see memorandum prepared by Smith representative of Proposed Agenda for June 11 (1957) meeting (full text, Ex. 260*, pp. 30-26 from bottom; R. 1119).

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*These exhibits were identified but not received in evidence at the trial of the fraud and contract counts. However, they are retained in the District Court Clerk's file and, under revised rule F.R.Civ.P. 75, were stipulated to be "a part of the record on appeal for all purposes" (R. 2200).

3. They urged that, if the two stores developed toget "there would be a smaller amount of specialty store competi than would arise if the [two] stores were to locate at inde dent sites" (Ex. 251*, pp. 3-4; R. 1098, lines 10-13).

4. In the light of the foregoing basic facts, the rep Smith to Hilltop (Ex. 29) is an admission against interest. on page 1 of Exhibit 29 (Smith App. 150), Smith (through it representative, Mr. Treiger) states that:

> "1) The population of the trading area [of Nutwood] i in itself, sufficient to generate substantial re- tail spending.
>
> "2) The site enjoys regional access. In fact, upon the completion of the contemplated highway improv ments, the site's accessibility throughout the trading area can be described as excellent.
>
> "3) Total retail spending by trade area residents is substantial. In view of the distance of the trad area from downtown Cleveland, it can be expected that very substantial portions of total spending will be retained by local facilities, (as opposed to facilities in downtown Cleveland). Thus, the potential for suburban facilities is very signifi cant.
>
> "4)**. . . ."

Why, then, did Smith accept employment from Hilltop or half of the Winslow sisters to make a study of the develop Nutwood as a regional shopping center? Why, then, after t favorable statements as to the qualifications of Nutwood a regional shopping center (Ex. 29) did they recommend againt

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*See footnote, page 3, supra.
**Re alleged competition, referred to below, pp. 19, 22ff.

It is no defense for Smith or for Austin that Hilltop read in newspaper accounts that Higbee and Halle might or would locate at Severance (AAB 11; SAB 65-6). If in fact Smith and Austin concealed from Hilltop the fact of their deliberate and expressed secret conspiracy with Higbee and Halle to prevent the development of any other regional shopping center site in the eastern area of metropolitan Cleveland, then, under any theory, not only the owners of Nutwood or of the various Beachwood sites but also all other such potential shopping center sites were the targets of this conspiracy. It was intentional, willful and deliberate. Whether others sued or not is immaterial. Their anticompetitive purpose is a jury question.

As this Court stated in Esco Corp. v. United States, 340 F.2d 1000, 1007 (9th Cir. 1965):

> ". . . it is well recognized law that any conspiracy can ordinarily only be proved by inferences drawn from relevant and competent circumstantial evidence, including the conduct of the defendants charged. Daily v. United States, 282 F.2d 818, 820 (9th Cir. 1960). A knowing wink can mean more than words. . . ."

There are many cases supporting this doctrine, but here we do not have to prove conspiracy by inference or by parallelism. All we have to do is examine the Contentions documented by correspondence and memoranda admitted or offered in evidence, which are specific conspiratorial agreements. It was, by the Contentions, agreed rather than inferred. Thus the issue of conspiracy is one of "fact" for a jury to decide. What more does one need

to prove in an antitrust action?

The antitrust cases cited by Smith and Austin are both
relevant and distinguishable. They ignore the target area t
of Twentieth Century Fox Film Corporation v. Goldwyn, 328 F.
190 (9th Cir. 1964), (HOB 20, 22), and of breach of a fiduci
duty constituting also an antitrust violation, Rangen, Inc.
Sterling Nelson & Sons, 351 F.2d 851 (9th Cir. 1965), (HOB 2
Furthermore, Goldwyn is supported by the latest case, Hoopes
Union Oil Co., (9th Cir. Cause No. 20,185, decided Feb. 3, 1
but not yet reported), _____ F.2d _____ (9th Cir. 1967).

The first case even remotely related to the issues unde
this portion of our Reply Brief is Parmelee Trans. Co. v. Ke
292 F.2d 794 (7th Cir. 1961), (SAB 64). This case upheld a
motion for dismissal because there was no genuine issue as t
material fact. But there are genuine issues as to material
in this case.

Productive Inventions v. Trico Products Corp., 224 F.2
(2nd Cir. 1955), (SAB 68), is not in point here. First, it in
volves a patentee and, secondly, it holds that only those a
a violation is directly aimed or who have been directly hare
may recover. This Circuit has distinguished such cases.

Rayco Manufacturing Company v. Dunn, 234 F.Supp. 593
Ill. E.D. 1964), (SAB 71), is really a case in favor of Hi
since, in effect, it holds that injury must result from le

*See Appendix attached hereto.

competition or monopoly and that, where there was no joinder to control the market or institute unlawful acts, there was no liability.

Savon Gas Stations No. 6, Inc. v. Shell Oil Company, 203 F.Supp. 529 (D. Md. 1962); aff'd 309 F.2d 306 (4th Cir. 1962), (AAB 27; SAB 64), is not relevant on the antitrust issues. It merely held that a restrictive covenant in a lease of a gasoline service station by owners of a shopping center, giving the lessee exclusive right to operate a service station in that particular shopping center, did not violate the Sherman Act since it was not a conspiracy. See Hoopes, supra, ¶III, p. 9. The facts are completely different from our case and therefore it should be disregarded.

Gaylord Shops, Inc. v. Pittsburgh Miracle Mile, etc., 219 F.Supp. 400 (S.D. Pa. 1963), (AAB 21; SAB 65), was not a conspiracy case under the Sherman Antitrust Act but a Robinson-Patman Act case. It involved discrimination against only one lessee in one shopping center and it held that interstate commerce was not involved. It also held that the Robinson-Patman Act applies only to commodities as distinguished from realty, whereas, in the Hoopes case, supra, the Sherman Act was held to apply to real estate.

The only other cases cited on the antitrust issues in either the Smith or Austin briefs which deserve, in our opinion, any mention are distinguishable as follows:

Page v. Work, 290 F.2d 323 (9th Cir. 1961), (SAB 64). case is clearly distinguishable since it involved only a sto holder's derivative action on behalf of a corporation engage publication of legal advertising which was completely intras in nature. There was no indication whatever of any intersta commerce by the publisher, the stockholder or any others inv in the case, which was entirely different from the factual s tion here. We might add that, in the case of Lone Star Ceme Corporation v. F.T.C., 339 F.2d 505 (9th Cir. 1964), the Pag case was referred to. It was neither approved, distinguishe overruled, but it is obvious from a full reading of the Lone case that the factual situation was quite different.

Conference of Studio Unions v. Loew's, Inc., 193 F.2d 5 (9th Cir. 1952), (AAB 29; SAB 67, 68), is not relevant on ei the facts or the law. The pertinent language is as follows:

> ". . . Not one of the acts alleged to have caused injury to the appellants effectuated or tended to create a restraint on commercial competition in the motion picture industry. . . . A conspiracy may have many purposes and objects; the conspirators may perform an almost infinite variety of acts in furtherance of the conspiracy; but, in order to state a cause of action under the anti-trust laws a plaintiff must show more th that one purpose of the conspiracy was the restraint of trade and that an act has been committed which harms him. He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. . . . Supra, 54-5.

Certainly under the text and under many of the references co tained in the pretrial order and the Contentions of Hilltop

which are assumed to be true, the conspiracy in this case was directed to all potential future shopping areas in eastern Greater Cleveland and Nutwood was within the target area of the economy involved.

Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (2nd Cir. 1964), (AAB 22; SAB 68), involves "remoteness" of the flow of bowling alley equipment in interstate commerce just as the Hoopes case, supra, involved the flow of gasoline in interstate commerce to Alaska. This, and other cases cited (SAB 68), are inconsistent with the Hoopes case, cited supra. Furthermore, the court in this case said at page 272:

> "There is nothing to indicate the amount of commerce affected or that the alleged restraint affects any bowling alley equipment other than the equipment that would have gone into the building to be leased by Lieberthal."

What a difference from the conspiracy claimed by Hilltop and assumed to be true (HOB App. B3; R. 829) and that of two interstate firms who entered into a conspiracy with two large department stores to prevent any further competition which, under the facts of this case, would definitely affect interstate commerce, the amount of which Hilltop is prepared to prove if given an opportunity to present its case to a jury. Compare the case of Safeway Stores, Incorporated v. F.T.C., 366 F.2d 795 (9th Cir. 1966), where the court stated at page 801:

> "Once the existence of the common scheme is established, very little is required to show that defendant became a party -- 'slight evidence may be

sufficient to connect a defendant to it.' (citing cases)

The other antitrust cases cited by Smith and Austin are irrelevant, both from a standpoint of fact and of law, that w do not think it necessary to take the time of this Court to d with them. We merely refer to Hilltop's Opening Brief (HOB 1 27), and again, particularly to the Goldwyn case, supra, wher this Circuit concluded that the plaintiff did not need to sho that the conspirators knew that their conspiracy would affect plaintiff (Hilltop and the Winslow sisters, in this case) as as they were within the target area. Again, we repeat that i was cited with approval in the Hoopes case, supra, both on th general question of conspiracy and the question of the target area, and the Hoopes case involved facts far less favorable t Hoopes than the facts in this case are to Hilltop and the Win sisters.

Finally, on the question of "standing to sue", see the l paragraph of Earl E. Pollock's article, 32 Antitrust Law Jour page 7.

Hilltop's Contentions Established "Fact" Of Damage*(SAB 1-3).

The "fact" of damage cases are clearly distinguished fro the instant case where, on motions for partial summary judgme and dismissal, the trial court accepted as true that Smith's allegedly false market analysis (Ex. 29) was made to suppres potential competition to Severance and that Austin conspired this same objective (HOB App. B3-4; R. 829-30).

Nor is the "fact" of damage issue properly before this c on motions for summary judgment or dismissal because, in grat

*See Rowley, 32 Antitrust Law Journal, pp. 75-86 (1966).

these motions, the trial court assumed the truth of the Contentions of Hilltop that Nutwood would probably have sold for $20,000 an acre had it not been for the conspiracy of Smith and Austin (R. 675, 829). The alleged "unlawful acts alone are proof of damage", Lessig v. Tidewater Oil Company, 327 F.2d 459, 471, note 31 (9th Cir. 1964), and other cases cited. The "fact" of damage has, with approval, been raised by a special verdict, Washington State Bowling Prop. Ass'n v. Pacific Lanes, Inc., 356 F.2d 371, 379 (9th Cir. 1966).

In Gaasland Co. v. Hyak Lbr. etc., 42 Wn.2d 705, 714, 257 P.2d 734 (1953), there was a "fact" of damage issue under a contract claim (SAB 2). The court cited 1 Restatement of Contracts, §331, comment a, of a jury finding damages where ". . . experience of mankind is convincing that a substantial pecuniary loss has occurred, while . . . the amount in money is incapable of proof. . . ." Here, likewise, there is no basis for reconstructing the past to show with precision the amount of damage. It will be for a jury to make its best estimate, not on speculation but on "experience of mankind".

Clearly Hilltop and the Winslow sisters were entitled to a jury determination of damages where the trial court assumed the "fact" to be true that, if Hilltop had been truthfully and loyally advised by Smith as to the suitability of Nutwood as a regional shopping center and related business development, a minimum of $20,000 an acre would have been warranted (R. 675).

It assumed also as true that comparable sales of property in t Greater Cleveland area for use as shopping centers ranged fro $10,000 to $50,000 an acre (R. 675). A jury should be permitt to determine the reasonable probability that Nutwood would ha been sold within that range but for the wrongful anticompetit acts of Smith and Austin.

The "fact" of damage is generally merged with the amount damage, 22 Am.Jur.2d, Damages, §§23, 24; McCormick, Damages, (1935). Thus, contrary to Smith's claim (SAB 1-3), if this is remanded, Hilltop will have its opportunity to prove to a jury the "fact" and "amount" of antitrust damages. The stand of proof will not be, as in the fraud count, that of "clear, cogent and convincing" evidence, but only of a "preponderanc" where the wrongdoers have made more precise evidence unavailb (HOB 60-1). If, then, the jury brings in a verdict for Hillt the court may, of course, review it to determine that there s sufficient predicate of "fact" of damage. But even if it sho hold that there was not, there would then be in the record suf cient opportunity for appellate review of such a determinat n If, on the contrary, the court should believe there was sufi evidence to justify a verdict, the fact that the court migh concluded differently is without significance (see HOB 21); an see Gilmartin v. Stevens Inv. Co., 43 Wn.2d 289, 294-6, 261 P.2d 73 (1953), opinion of then Judge Hamley; and Walla Port District v. Palmberg, 280 F.2d 237, 249 (9th Cir. 196

A case almost completely parallel on "fact" of damage is Jerrold Electronics Corp. v. Wescoast Broadcasting Co., 341 F.2d 653, 660-1, 663 (9th Cir. 1965). It was another antitrust case before Judge Beeks. Preliminary motions to take it from the jury were denied. The jury rendered a verdict for plaintiff (D.C. WD Wash. ND 1964, No. 5346, Wescoast v. Jerrold). The District Court file shows that thereafter defendants filed motions for judgment notwithstanding the verdict and for a new trial alleging a complete lack of proof of "fact" of damage and that the evidence was totally insufficient to show any liability. These motions came on for hearing March 2, 1964 (No. 5346, Papers 55, 56, Tr. Vol. 20). Counsel for plaintiff contended:

> "Your Honor will recall that when I asked for time to argue for a motion for directed verdict your Honor granted it to me and said, whether or not you agreed with me, you would leave it to the jury because this could be considered later . . . and I shall try . . . to show . . . why . . . we are entitled to judgment." (Emphasis added.) (No. 5346, Tr. Vol. 20, p. 2109)

The court, after argument, denied the motions stating:

> "I am very frank to say, gentlemen, that if the matter had been tried to me that I have considerable doubt as to whether I would have found any damages in this case. I doubt that I would have; but I do think that there was sufficient evidence that the jury was entitled to find what they did and I cannot substitute my judgment for theirs." (Emphasis added.) (No. 5346, Tr. Vol. 20, pp. 2133-4)

Thus, the "fact" of damage and the "amount" of damage were merged in the jury verdict. This Court affirmed Jerrold Electronics, supra, 341 F.2d at 666. The "fact" of damage should be similarly merged on jury trial here.

Evil Intent Not A Requisite Of Civil Conspiracy.

Jerrold, supra, like Austin (AAB 17-8), also claimed that proof of conspiracy requires evidence of evil design. This C rejected such a contention, quoting with approval Continental Co. v. Union Carbide Corp., 370 U.S. 690, 707, 8 L.ed.2d 777, 82 S.Ct. 1404, 1415, that:

> "'[I]t is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme.'" Jerrold, supra, at 663.

Jury Trial A Normal Procedure In Antitrust Cases.

Finally, the issue here is summary judgment in a complex antitrust case where the Supreme Court has cautioned against denial of jury trial where the facts are sharply in dispute (HOB 3, 25).

Hilltop respectfully submits the antitrust claims should remanded for jury trial of its complex issues.

Statute Of Limitations.

As to Count 3, involving violations of the Ohio antitru law, there is no statute of limitations. The second paragra §1331.12 of the Ohio Revised Code reads:

> "No statute of limitation shall prevent or be a bar to any suit or proceeding for any violation of Section 1331.01 to 1331.14, inclusive of the Ohio Revised Code."

(The above refers to the sections of the Ohio Revised Code r ing to "Monopolies".) This answers any arguments as to the

applicability of any statute of limitation to Count 3.

We assume it is conceded that the statute of limitations under the Federal laws is four years. Therefore, under the facts of this case, the statute of limitations had not run when the First Amended Complaint of Hilltop was filed because Smith and Austin were still commiting conspiratorial overt acts in the construction of a shopping center, including the Higbee and Halle stores, which, in their own language, would "dominate" the eastern area of metropolitan Cleveland and preclude any further competition (see Hoopes case, supra, ¶II, pp. 8-9). Austin contended the claim against it is barred by the statute of limitations (AAB 31-3). Hilltop did not know anything about a conspiracy by Smith and Austin to preclude the development of other shopping centers in eastern Cleveland until discovery proceedings began in 1963-4 (Tr. 2514-6). The fraudulent concealment doctrine therefore tolled the statute of limitations until Hilltop knew of the conspiracy directed against it. This was well settled in the electric industry cases (see in particular Kansas City, Missouri v. Federal Pacific Electric Co., 310 F.2d 271 (8th Cir. 1962); cert. den. Nov. 19, 1962, 83 S.Ct. 256. The first notice Hilltop had of any relationship other than as a consultant of Smith to Austin was on July 21-22, 1960, when Cleveland newspapers indicated that Austin had sold Severance to Smith (R. 1244). After repeated inquiries (R. 1245-51) concerning the nature of the Smith-Austin relationship and the validity of the original report

(Ex. 29), Smith tendered to Hilltop a "substantiating" report (Ex. 10) in February 1961. This had the effect of lulling Hilltop into the belief that the report was valid. Even if th statute of limitations did not commence until 1963 or 1964 dur ing discovery proceedings (when Hilltop first learned of the c spiracy directed against it), the statute of limitations in an event had not run because Smith's "substantiating" report in February 1961 had the effect of lulling Hilltop into the beli that the report was valid.

Thus, under the fraudulent concealment doctrine referred supra, the only question is whether Hilltop exercised reasona diligence in filing its First Amended Complaint which was "lo July 20, 1964, and "filed" July 24, 1964. Certainly, in view Hilltop's repeated inquiries concerning the nature of the Smi Austin relationship and Smith's "substantiating" report, Hill acted with reasonable diligence.

But even if these two arguments are invalid, the fact th the action was filed four years and three days after Hilltop the July 21, 22, 1960, newspaper stories does not mean the statute of limitations had run, as the "lodging" of Hilltop's First Amended Complaint, which was accomplished within the 4 period, was sufficient to toll the statute. See Robinson v. Waterman S.S. Co., 7 F.R.D. 51, 53 (DC D. N.J. 1947); Thorndi Smith, Wild, Beebe & Cades, 339 F.2d 676, 679 (8th Cir. 1965.

Interstate Commerce.

So far as Count 3 is concerned, involving Ohio law, the oint of interstate commerce is immaterial and we, therefore, ereby dispose of it.

As to Count 4, it was admitted that many of the purchases at everance Shopping Center were from out-of-state customers and ome of the sales were to out-of-state purchasers (R. 682). urthermore, it has been admitted that Smith and Austin were arge interstate commerce corporations, perhaps the greatest in heir particular fields (R. 681). In the recent Hoopes case, upra, this Circuit sustained the jurisdiction of the trial ourt even though none of the sales of Hoopes' lessee were in nterstate commerce, and certainly Hoopes was no more engaged in nterstate commerce than Hilltop or the Winslow sisters were, ince he was merely the owner and lessor of a service station and ot engaged in the business of selling gasoline. It is obvious, herefore, from a consideration of the facts in the Hoopes case nd the decision of the Court, that interstate commerce would not ave been involved had it not been for the fact that Union Oil ompany was itself engaged in interstate commerce, just as Smith nd Austin were here. It is therefore obvious that the cases ited by Austin and Smith (AAB 21-9; SAB 64-5) on this issue are ot relevant.

COMPENSATORY DAMAGES
Counts 1 and 2

(SAB 3-60)

Count 1, fraud, and Count 2, breach of contract, involve substantially the same facts. Count 1 is not discussed in this Reply Brief because judgment was granted in Hilltop's favor as to punitive damages and attorney's fees. The remaining claims for compensatory damages under Count 1 are the same as those discussed below for compensatory damages under Count 2.

The Conclusions Of The Nutwood Analysis (Ex. 29) Were Clearly False And Fraudulent (SAB 3-22).

On January 8, 1960, Hilltop received a copy of the Nutwood analysis (Ex. 29) from Smith. It received nothing more until after the Winslow sisters had sold Nutwood in June 1960, except for copy of an inaccurate memo dated August 9, 1960, justifying Smith's conflict of interest (R. 1246-7), until February 1961 when it received a copy of the so-called "substantiating" report (Ex. 10) at the offices of Smith's Cleveland counsel (Tr. 2644; R. 1249). It saw no work papers or other supporting data until after the beginning of discovery in this lawsuit (Tr. 2514-6).

The false and fraudulent nature of the Nutwood analysis can be found by comparing the story Exhibit 29 tells with Smith's later attempt to defend and justify its conclusions.

The cover letter of the Nutwood analysis (Ex. 29; Smith App. 150-2) dated January 7, 1960, comments on the four basic elements of any shopping center analysis as follows:

"1) The population of the trading area is, in itself, sufficient to generate substantial retail spending.

"2) The site enjoys regional access. In fact, upon the completion of the contemplated highway improvements, the site's accessability throughout the trading area can be described as excellent.

"3) Total retail spending by trade area residents is substantial. In view of the distance of the trade area from downtown Cleveland, it can be expected that very substantial portions of total spending will be retained by local facilities, (as opposed to facilities in downtown Cleveland). Thus, the potential for suburban facilities is very significant.

"4) Competition, particularly in the department-store-type-merchandise categories is very substantial. Over a million square feet of department store space exists or is planned in the eastern suburbs of the Cleveland metropolitan area.

The preceding factor is particularly responsible for the conclusions of our analysis with respect to Nutwood Farms."

We will now deal with each of these four basic elements:

1. Population:

The cover letter to Exhibit 29 (Smith App. 150) states:

"The population of the trade area is, in itself, sufficient to generate substantial retail spending."

This statement should be compared with Smith's Answering Brief (SAB 37) which says:

". . . [Nutwood] had too few people . . . [and] about one-half of the area from which Nutwood would be normally expected to draw its patronage was deep in Lake Erie . . ."

The statement in Exhibit 29 should also be compared with Smith's appraiser's assertion that Nutwood was in "a pioneering area",

the density of the population of which "would not support a re gional shopping center" (Tr. 2006-7); and with John Marshall's assertion that one of the factors in causing the conclusions o the analysis to be negative was the "very sparseness of popula tion on the outboard side" (Tr. 1677).

These comparisons illustrate the tardiness of Smith's "di covery" that the Nutwood trade area lacked sufficient populati for a regional shopping center because half of it is now allegedly "deep in Lake Erie".

The approximate population of the Nutwood trade area was almost as easy for Hilltop to determine in 1960 as it was for Smith. So Smith reported that the population was sufficient t support a regional shopping center and blamed the absence of potential for Nutwood on its own esoteric concept of "effecti competition", a factor which it knew Hilltop to be incapable f challenging. Now that that concept is challenged, Smith ques tions the adequacy of the population of the Nutwood trade are, thus attacking the integrity of its own findings.

2. Access:

The cover letter to Exhibit 29 (Smith App. 150) further states:

> "The site enjoys regional access. In fact, upon the completion of the contemplated highway improvements, the site's accessability throughout the trading area can be described as excellent."

Compare this with the statement of Smith's Answering Brief (SAB 37-8) that:

> "Another problem with Nutwood was that accessability from the freeway spur was dependent upon whether the Bureau of Roads would approve a four-way interchange near the property. This approval was still conjectural when the sisters sold to Ridge Hills."

Compare the unqualified statement in the analysis with the implication (SAB 21) that Richmond Mall and Great Lakes Mall, both of which lie within the Nutwood trade area, but each of which is farther from the freeway, are somehow more favorably located. And compare the analysis with Larry Smith's recent "discovery" that freeway access to a regional shopping center is relatively unimportant (Tr. 2352-3).

Hilltop, of course, knew as much about existing and potential access to the Nutwood site in January 1960 as Smith did. So Smith, in the Nutwood analysis, described access to Nutwood in glowing terms and blamed its lack of potential on excessive competition, as determined through the use of its private and unfathomable concept of "effective competition". Now, with that concept under challenge, Smith questions access to Nutwood as to the time of its analysis.

3. Retail Spending:

Smith, in its Nutwood analysis (Ex. 29, cover letter; Smith App. 150), described spending in the Nutwood trade area as follows:

> "Total retail spending by trade area residents is substantial. In view of the distance of the trade area

> from downtown Cleveland, it can be expected that very substantial portions of total spending will be retained by local facilities, (as opposed to facilities in downtown Cleveland). Thus, the potential for suburban facities is very significant."

Compare this with Smith's implication in its Answering Brief t the Nutwood site was similar to one in the Mojave Desert and t about one-half of its trade area is deep in Lake Erie (SAB 37) and that the potential which Smith found in 1960 and tapped nc on both sides of Nutwood, by new large regional centers at Richmond Mall and Great Lakes Mall (SAB 21), could be caused t disappear by a theory called "effective competition" which app ently affected only the site at Nutwood.

4. Competition:

Smith's 1960 analysis of Nutwood (Ex. 29, cover letter; Smith App. 150-1) cites no negative factors except for compet tion, described like this:

> "Competition, particularly in the department-store-type-merchandise categories is very substantial. Over a million square feet of department store space exists or is planned in the eastern suburbs of the Cleveland metropolitan area."

The minimum size of a department store for a regional shoppin center is agreed to be 150,000 square feet (Tr. 1918; Ex. 29, App.; SAB 22). A comparison of the table of existing and announced department stores in eastern Metropolitan Cleveland (Ex. 29, between pp. 5 & 6) with the map of the Nutwood trade area (Ex. 29, just before p. 1) leads to certain inevitable co clusions as to competition:

(1) Not one square foot of the more than 1,000,000 square feet of full-line department store space existing or planned in the eastern suburbs of Cleveland in 1960 was located or planned for the Nutwood trade area as delineated by Smith;

(2) The only significant department stores which even affected the Nutwood trade area were at least eight miles distant, inboard from the Nutwood site and outside of the Nutwood trade area; and

(3) The closest competing site with a full-line department store was that of the proposed Severance development, Smith's own site, the negotiations for the purchase of which were at a crucial stage during the preparation of the Nutwood analysis.

In spite of the total absence of full-line department stores in or near the Nutwood trade area, Smith found such overwhelming "effective competition" affecting the Nutwood trade area as to make the site useless for regional shopping center purposes. Smith's Answering Brief deals with this concept from pages 6 through 22. Smith's argument is summarized (SAB 11) in the statement:

> "[Hilltop's] error is simply that it confuses retail sales <u>potential</u> and retail sales <u>capacity</u>. Potential is the amount of dollar spending that will be available within a given area. Capacity, on the other hand, is a measure of the capability of existing retail facilities at normal levels to absorb what potential may exist . . ."

For this distinction, Smith, in its Answering Brief, cites almost every Smith witness who testified at the trial and we

readily admit that almost every Smith witness made the distinc tion at some point in his pretrial or trial testimony.

The only sources of the definition of "sales capacity" an "effective competition" omitted from Smith's Answering Brief a Smith's 1960 Analysis of Nutwood Farms (Ex. 29) and its contem porary analysis of Severance (Ex. 142), and they tell an exact opposite story.

Those printed definitions cannot be reconciled with the d tinction which is the basis for Smith's Answering Brief, the gist of which is quoted above.

In Exhibit 29, "Total Sales Capacity" is defined as:

> ". . . the estimated . . . sales volume that existing retail facilities are capable of . . . holding under normal competitive conditions . . . In no way does the . . . term connote maximum physical capacity of a given plant to attain a given volume. It is, rather, an estimate of the amount of business that would be expected to be retained by existing stores in the face of competition from new facilities . . ."

and "Effective Competition" is defined in the Nutwood Farms Analysis (Ex. 29) as simply that portion of the "total sales a acity" of any store or stores derive from within the trade a under study.

And Exhibit 143, page 18, a study of Severance, defined "Effective Competition" as:

> ". . . the volume which . . . competitive facilities would probably continue to obtain from within the Severance Center trade area, even after the development of Severance Center . . ."

If sales capacity was, as Smith claims (SAB 11):

> ". . . a measure of the capability of existing retail facilities . . . to absorb what potential may exist"

Smith's position on this appeal would be difficult to assail. But that is exactly what it is not, according to the definitions in the Nutwood and Severance analyses. Capacity is "an estimate of the amount of business . . . to be retained by existing stores in the face of competition from new facilities", not a measure of capability to absorb either present or future potential. Thus, "effective competition" which is only a percentage of "total sales capacity", obviously can never exceed the potential of a given area but will always be at least a little less than the potential unless it is assumed that new facilities will do no business at all. Smith's use of the terms "total sales capacity" and "effective competition" in its Answering Brief is in error. This is the crucial point in this appeal. As a result, Smith's determination of "effective competition" in the Nutwood analysis was not only erroneous but impossible by the terms of its own definitions.

The Undelivered Introduction To Exhibit 29 (Ex. 175, bottom 3 pages).

The Nutwood analysis (Ex. 29) was fraudulent, not only because of the misinformation which it contained, but because of the valuable information which it omitted. Smith argues (SAB 3-5) that the introductory letter (Ex. 29; Smith App. 150-2) was a

substitute for the undelivered Introduction (Ex. 175, bottom 3 pages). This it may well have been, but it clearly omitted mu of the information contained in the undelivered Introduction. That Introduction (Ex. 175, bottom 3 pages) not only postulate Montgomery Ward as a potential tenant, one which might well ha been impressed with a recommendation from Smith, but also explained the reason for the extremely low percentage figures us in the Nutwood analysis (Ex. 29, pp. 6-7) in connection with t "Share of the Market Approach". Without the information contained in the undelivered Introduction, those percentages wer totally unexplained, although they were the key to the negati conclusions postulated by Smith as stemming from the "Share o the Market Approach" (Ex. 29, pp. 6-7; Tr. 1567, 1676, 2199).

In summary, Smith was correct in stating that "the poten for suburban facilities is very significant" in the Nutwood tra area but it vastly overstated the effect of competition as sho conclusively by what has happened in the Nutwood area since he Smith analysis. What has happened has indicated the accurac o the third finding of Smith's cover letter to the Nutwood anay

> "Total retail spending by trade area residents is substantial. . . . very substantial portions of total spending will be retained by local facilities . . . . Thus, the potential for suburban facilities is very significant."

The substantial retail spending by trade area residents being retained, not so much by the competition which Smith co cluded was so substantial as to preclude the development of

Nutwood as a regional shopping center, but by local facilities, including two major full-line department stores, one at Richmond Mall and one at Great Lakes Mall, together with at least six junior department stores or discount department stores built or planned since 1960 (R. 1456). The full-line department stores include a total of 475,000 square feet, and the junior and the discount stores at least 450,000 square feet (R. 1456).

Smith's findings 1), 2) and 3), in the cover letter to the Nutwood analysis (Ex. 29) were absolutely correct, but Smith's conclusions, the negative nature of which was based solely on Smith's contrived concept of "effective competition" were totally incorrect.

It is admitted that Smith failed to disclose to Hilltop the conflict of interest arising out of its almost completed negotiations to purchase Severance (R. 658ff). The conclusions of its analysis were clearly erroneous due solely to the misuse of its own methodology in determining competition.

Hilltop Proved That The Value Of Nutwood Substantially Exceeded $3,500 Per Acre.

Smith argues that Hilltop failed to prove that Nutwood was worth more than $3,500 per acre, principally because Hilltop's appraiser based his appraisal on developments subsequent to January 8, 1960 (SAB 43-60).

No appraiser viewing land in 1965 could see it precisely as it existed five years earlier. Mr. Fenton was no exception. But

the cause of Mr. Fenton's 1965 appraisal was Smith's 1960 fr
in failing to disclose its interest in Severance, and that f
distinguishes this case from any case dealing with condemnat
the type of precedent which is almost the exclusive basis fo
Smith's argument.

Even if Mr. Fenton's testimony is interpreted in the li
most favorable to Smith's case, Mr. Fenton assumed only thos
access conditions assumed by Smith in the preparation of Exh
29, used 1960 census material totally consistent with 1960 p
lation estimates used by Smith (Ex. 10, p. 5, where Smith st
the accuracy of its estimates as demonstrated by the 1960 ce
figures), and determined from his own investigation that zon
was not a problem. Smith raised no question of zoning in 19
and subsequent events proved both Smith and Fenton correct.

The only significant information available to Mr. Fent
1965, which would not have been available to him in 1960 an
was not assumed by Smith in the preparation of Smith's Nutwo
analysis, consisted of certain sales of regional shopping ce
sites between 1960 and the date of the trial. The use of sc
sales in establishing value is proper, United States v. 63.4
Acres of Land, 245 F.2d 140, 144 (2nd Cir. 1957); 32 C.J.S.
Evidence, §593(3), note 93.10, p. 736-7.

The trial court fell into the error urged by Smith an
dently treated Mr. Fenton's testimony as if it were presen
a condemnation action in which the search for valuation of

land to be condemned is directed at, or near, the date of trial (Tr. 2771; R. 1470). This was error. The error was particularly significant as the trial court found that no expert opinion presented by Smith was directed at the value of Nutwood as a regional shopping center as of the date of Smith's fraudulent analysis (Tr. 2771; R. 1470). Thus, Mr. Fenton's testimony as to the value of Nutwood as a regional shopping center in 1960 was the only valid evidence before the trial court of that value. Furthermore, Mr. Fenton's estimate of the value of Nutwood as a regional shopping center site is substantiated by no less an authority than Larry Smith himself; see Smith's statements in Shopping Towns USA (1959) concerning the cost per acre of shopping center sites even "without a commitment in advance from a major tenant" (Ex. 368, p. 40) and with only "a reasonable likelihood that rezoning can be achieved" (Ex. 368, p. 38).

CONCLUSION

We respectfully submit that Hilltop and the Winslow sisters were entitled to a jury trial of the antitrust counts 3 and 4 because there were genuine issues of material facts, Poller v. Columbia Broadcasting System, 368 U.S. 464, 7 L.ed.2d 458, 82 S.Ct. 486 (1962).

Further, on count 2 (which embraces substantially the same compensatory damage issues as count 1), the trial court clearly erred in failing to find a fair measure thereof. This count should be remanded to the trial court for further determination

in a manner consistent with this Court's Opinion after oral ment and submission because we believe it will reach the "de ite and firm conviction that a mistake has been committed", United States v. United States Gypsum Co., 333 U.S. 364, 68 525, 92 L.ed. 746, 748 (1948), (Hilltop's Ans. Br. on Appeal 72).

DATED at Seattle, Washington, April 5th, 1967.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Herbert S. Little
of
Attorneys for Cross-Appellants,
HILLTOP REALTY, INC., et al.

PROOF OF SERVICE

I CERTIFY that, pursuant to Rule 18(2)(d), on April 5th 1967, I caused five copies each of the foregoing document to be served on Helsell, Paul, Fetterman, Todd & Hokanson, attention of Richard S. White, Esq., and Gerald G. Day, Esq., 1610 Washington Building, Seattle, Washington 98101, counsel for Larry P. Smith, et al., and on Bogle, Gates, Dobrin, Wakefield & Long, attention of Robert W. Graham, Esq., and Ronald E. McKinstry, Esq., 14th Floor Norton Building, Seattle, Washington 98104, counsel for The Austin Company, by having my secretary hand deliver the same to them at said addresses and that said attorneys are all of counsel of record for cross-appellees.

Herbert S. Little

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT HOOPES and RAE S. HOOPES,
Appellants,

vs.

UNION OIL COMPANY OF CALIFORNIA,
a corporation,
Appellee.

No. 20,185

[February 3, 1967]

Appeal from the United States District Court
for the District of Alaska
at Fairbanks

Before: BARNES, KOELSCH, and BROWNING, Circuit Judges

BROWNING, Circuit Judge:

The appellants, Mr. and Mrs. Hoopes, brought this action under section 4 of the Clayton Act, 15 U.S.C. § 15, against the Union Oil Company of California to recover treble damages for injuries allegedly resulting from violation of the antitrust laws, "including but not limited to" sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13. Two additional causes of action were alleged but are not at issue here.

After answer, partial discovery, and other pretrial proceedings, both sides moved for summary judgment on the antitrust claim. The district court granted Union's motion on the ground that appellants "lacked standing to sue . . . for the reason that under the facts of this case they are not persons injured in their business or property by reason of anything forbidden in the anti-trust laws

within the meaning of 15 U.S.C.A. § 15."[1] The district court determined there was no just reason for delay and directed entry of judgment. Rule 54(b), Fed. R. Civ. P. This appeal followed. We reverse.

The business history which climaxed in this suit may be briefly summarized as follows.

In 1945 appellants built a garage and service station on two lots which they owned in Fairbanks, Alaska. For a period of ten years, until late in 1955, the premises were operated as a Union station under "lease and leaseback" agreements between appellants and Union.

In the fall of 1955 Victor D. Hart expressed an interest in purchasing the service station from appellants. Negotiations involving appellants, Union, and Hart resulted in the execution on December 21, 1955, of the following related agreements.

Appellants and Union executed an instrument cancelling their "lease-leaseback" agreement on the property, which then had five and a half years to run.

Appellants contracted to sell the property to Hart. Hart paid appellants a down payment, borrowed from a bank, and executed "mortgages" on the real and personal property to secure the loan. Union arranged with the bank for the loan to Hart, and it agreed to satisfy the "mortgage" by payments to the bank of one cent on each gallon of Union gasoline sold by Hart at the station.[2]

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[1]Section 4 of the Clayton Act, 15 U.S.C. § 15, reads:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

[2]Appellants allege that this one-cent payment constituted a discount or "kickback" to Hart and was not given in equal amount to other service station operators, and that this and other Union practices reflected price discrimination violating 15 U.S.C. § 13(a). As we read the allegations, these practices are attacked as among the means al-

Hart "leased" the property to Union for a term of fourteen years, ending December 31, 1970, Union agreeing to pay Hart "rent" of 1½ cents on each gallon of its own gasoline sold at the station. Hart "assigned" these rental payments to the bank to be applied to the down payment loan. Union "leased" the property back to Hart for the same fourteen-year term, Hart agreeing to pay Union "rent" of 1½ cents per gallon on all gasoline sold at the station, regardless of brand. Hart's "lease" to Union was terminable only at Union's option and on the occurrence of specified events affecting the usefulness of the premises as a service station. Union's "leaseback" to Hart was terminable by either party without cause on seven days' notice.

Appellants executed a "consent clause," attached to the Hart-Union "lease," by which appellants agreed that if they acquired possession of the premises before the "lease" expired, Union would be entitled to possession for the remainder of the fourteen-year lease.

Hart took possession of the property under this series of agreements, and operated it until August 9, 1956. On that date Hart "subleased" the station to two other individuals, Mr. Schroeder and Mr. Wisel. On April 1, 1957, Hart "subleased" the station to a corporation, Transfare, Inc., which he formed with the same two individuals. Both of these "subleases" were made with the consent of Union, and appellants allege that Union required the "sublessees" to agree to the same arrangements as existed between Union and Hart.

The business did not prosper, and on May 19, 1958, Hart and Transfare, Inc., quitclaimed their interests back to appellants. Appellants then leased the premises to Transfare, Inc., at an agreed monthly rental for a five-year term. "Rental" payments to Union under the Union "leaseback" to Hart were discontinued.

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legedly employed by Union to effectuate its program of exclusive dealing, and we do not consider the problems which would be raised if they stood alone. See note 6.

Since appellants' price discrimination allegations appear relevant on the theory suggested, we think the district court erred in barring discovery as to this issue.

At this juncture Union gave notice of Hart's default under the "leaseback" and demanded that appellants (and Transfare, Inc., appellants' lessee) relinquish possession of the premises under the "consent clause" to the Hart-Union "lease." Upon appellants' refusal, Union filed suit in the Alaska state courts seeking, among other things, to enforce its alleged right to possession, and to require appellants to pay off the balance due on Hart's obligation to the bank secured by the "mortgages" on the premises.[3]

On April 30, 1961, while the state court action was pending, Transfare, Inc., surrendered the premises to appellants. Appellants allege that they then tried to sell or lease the station but their efforts were frustrated by Union, which informed prospective purchasers and lessees that it held a valid fourteen-year lease on the station and threatened appellants with suit for an injunction if they persisted in their efforts to sell the property or lease it.

On April 11, 1962, the state court entered judgment denying Union relief. The court held that Union was not entitled to possession because the various agreements executed by appellants, Union, and Hart on December 21, 1955, were not intended to and did not create a landlord-tenant relationship. The court further held that appellants had not agreed to guarantee the down payment loan or to "mortgage" the premises to secure it, and that Union had no interest in the property in the nature of a "mortgage" or otherwise.

The state court found that the "lease-leaseback" agreements constituted a "requirements" contract intended "to bind the owner-operator to Union's product, as well as to impose a sanction in order to maintain an exclusive outlet for Union's gasoline," and that the "consent clause" to the "lease," signed by appellants, was

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[3]The facts thus far stated are taken from the state court's finding in this litigation.

The parties agree that these findings of fact, and others later recited in this opinion, were necessary to the state court judgment, and are binding upon them.

The state court also held that the "lease-leaseback" arrangement "would not probably foreclose competition in a substantial line of commerce affected throughout the area of effective competition." But the parties also agree that this finding was not necessary to the state court's judgment, and is therefore not binding.

"part and parcel of Union's objective of maintaining its exclusive outlet by a continued binding of the owner-operator of the subject premises to a requirements contract." The state court found that "Union desired to tie-up the subject premises to maintain an exclusive outlet for the sale of its gasoline," and that "Since the date of the alleged breaches by defendants and the inception of this litigation to the date of trial, Union has received of defendants precisely the object of the overriding intent of Union throughout this transaction, and that is that since the alleged breaches to the date of trial, Union's, and only Union's, gasoline has been sold from defendants' premises."

After the state court decision, Union took the position that although it was not entitled to possession of the station it "had a valid requirements contract with respect to this property," and therefore "for the term of this requirements contract (i.e., until December 31, 1970), Union Oil products must be used in the premises." Appellants allege that by advancing this claim, coupled with a warning that the premises were subject to a valid "mortgage,"[4] Union frustrated negotiations between appellants and various prospective purchasers or lessees subsequent to the state court decision. Appellants allege that such incidents occurred in or about June, September, and October of 1962, and February of 1963.

The complaint in the present action was filed January 18, 1963. It alleges that Union sells in excess of 40 per cent of the petroleum products sold in the Fairbanks metropolitan area and in the State of Alaska as a whole, and occupies a dominant position in the marketing of petroleum products in those areas. The complaint

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[4]As we have noted, text at note 3, the state court found that no interest in the property superior to appellants' interest was created by the "mortgage" executed by Hart December 21, 1955.

Moreover, appellants' second cause of action in the present suit alleged that the claims based upon the "lease-leaseback" arrangements and the "mortgages" were "wrongfully and maliciously asserted and are without any right whatever." On April 17, 1963, the district court granted partial summary judgment in appellants' favor as to this cause of action, holding that there was "no genuine issue of any material fact" with respect to liability, and that the only issue was that "of damages claimed as a result of wrongful and unlawful actions on the part of [Union] in asserting such claims."

details Union's conduct which resulted in the exclusion of all but Union products from appellants' service station. The complaint charges that Union pursued a similar course of action with respect to "numerous" other service station owners and operators, and thereby required them to maintain their service stations as exclusive outlets for Union's products. It alleges that Union acted for the purpose and with the effect of foreclosing competition in a substantial line of commerce, and that its conduct violated the antitrust laws. The complaint charges that by reason of Union's acts appellants were unable to operate a service station on the premises or to sell or lease the property for that purpose from the time the station was vacated by Transfare, Inc., on April 30, 1961, and that appellants thereby suffered damage, through loss of rental income from the property and diminution of its value, in the amount of $50,000.

I

Union relies upon a number of cases (particularly *Harrison v. Paramount Pictures Inc.*, 115 F.Supp. 312 (E.D. Pa. 1953), *aff'd* 211 F.2d 405 (3d Cir. 1954), and *Melrose Realty Co. v. Loew's Inc.*, 234 F.2d 518 (3d Cir. 1956)),[5] which Union reads as holding that a lessor may not recover damages under 15 U.S.C. § 15 for injuries resulting from a violation of the antitrust laws directed against the lessee, because as to the lessor such injuries are "remote," "indirect," or "incidental."[6] As this court and others

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[5]See also Westmoreland Asbestos Co. v. Johns Manville Corp., 30 F.Supp. 389 (S.D.N.Y. 1939), aff'd 113 F.2d 114 (2d Cir. 1940). But see Steiner v. Twentieth Century Fox Film Corp., 232 F.2d 190 (9th Cir. 1956); Congress Bldg. Corp. v. Loew's Inc., 246 F.2d 587 (7th Cir. 1957); and Sandidge v. Rogers, 256 F.2d 269 (7th Cir. 1958). And compare also decisions allowing recovery for damages resulting from intentional and unprivileged interference with plaintiffs' existing or prospective contractual relations with others, particularly cases collected in Prosser on Torts 960 nn. 20-32 (1964). See also Harper & James, Torts 499, 502-03, 511-13; 2 Callmann, Unfair Competition 585 (1950); 4 Restatement, Torts § 766.

[6]Union also relies upon authority which it reads as denying appellants standing to sue for damages resulting solely from alleged price discriminations in favor of, or against, appellants' lessees. The record does not present that question. See note 2.

have noted,[7] language in a number of Supreme Court opinions[8] casts doubt upon these and other restrictive "judicial glosses"[9] upon the broad language of the Clayton Act § 4, 15 U.S.C. § 15. Be that as it may, the relationship disclosed in this record between Union's violation and appellants' injury satisfies all of the formulations of the statute's requirements suggested by any decision of which we are aware, including those relied upon by Union.

The gist of appellants' charge is that Union sought to restrain competition by restricting a substantial number of retail outlets, including appellants' service station, to the sale of Union gasoline. The alleged purpose and effect of Union's course of conduct was to foreclose competitive sales through appellants' service station. Appellants, as the owners of that property, were the key to its control, and they were the direct and primary objects of the means by which Union undertook to accomplish its purpose. Appellants' contract vendee, the successive lessees, and the various potential lessees and purchasers of the property from appellants were objects of Union's attention only as this became necessary to the imposition and enforcement of the desired anticompetitive condition upon the use of the property itself.

Union's allegedly illegal conduct was thus "aimed" at redistricting the use of appellants' property. Appellants and their property were within the "target area" of that conduct—"the area which it could reasonably be foreseen would be affected" by the antitrust violation. *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 220 (9th Cir. 1964). See also *Karseal v. Richfield Oil Corp.*, 221 F.2d 358, 362-64 (9th Cir. 1955); *Conference of Studio Unions v. Loew's Inc.*, 193 F.2d 51, 54-55 (9th Cir. 1951). Appellants' claim was not "derivative," for they sued for damages sustained by themselves and not by their tenants or

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[7]South Carolina Council of Milk Producers v. Newton, 360 F.2d 414, 418 (4th Cir. 1966); Harman v. Valley Nat'l Bank, 339 F.2d 564, 567 (9th Cir. 1964); Congress Bldg. Corp. v. Loew's Inc., 246 F.2d 587, 592 (7th Cir. 1957); 64 Colum. L. Rev. 570, 587 (1964); 41 Wash. L. Rev. 174, 179-80 (1966).

[8]Particularly Radovich v. Nat'l Football League, 352 U.S. 445, 453-54 (1957); and Radiant Burners v. Peoples Gas Co., 364 U.S. 656, 660 (1961). See also Guilfoil, 10 Antitrust Bull. 747, 776 (1965); Note, 69 Harv. L. Rev. 575, 576 (1956).

[9]64 Colum. L. Rev. 570, 585 (1964).

others. Their injuries were "direct" for they arose out of appellants' own relationships with Union—reflected in the "consent clause," the state court litigation, and Union's successful efforts to prevent appellants from leasing or selling the premises free of the restrictive condition. Appellants' injuries were not "consequential" or "secondary," for they did not result from injury to third persons. They were not "remote," for they were the immediate result of the illegal conduct, without intervening cause. *Congress Bldg. Corp. v. Loew's Inc.*, 246 F.2d 587, 592-94 (7th Cir. 1957); *Steiner v. Twentieth Century Fox Film Corp.*, 232 F.2d 190, 192-93 (9th Cir. 1956); *Productive Inventions v. Trico Prods. Co.*, 224 F.2d 678, 679 (2d Cir. 1955); *Conference of Studio Unions v. Loew's Inc., supra* at 54-55.

Imposition of liability for such damages clearly serves the statute's purposes. *South Carolina Council of Milk Producers v. Newton*, 360 F.2d 414, 418-19 (4th Cir. 1966); *Karseal v. Richfield Oil Corp., supra* at 365; *Conference of Studio Unions v. Loew's Inc., supra* at 54-55; 64 Colum. L. Rev. 570, 587 (1964); 57 Nw. L. Rev. 691, 707 (1963).

It is no bar that appellants were not competitors of Union, or that appellants' injuries did not result from the effect of the allegedly illegal restraint upon the marketing of petroleum products but rather from the means which Union used to accomplish that restraint. *Radovich v. Nat'l Football League*, 352 U.S. 445 (1957); *United Copper Sec. Co. v. Amalgamated Copper Co.*, 232 Fed. 574 (2d Cir. 1916). "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Neither does it immunize the outlawed acts because they are done by any of these. The act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Farms v. Sugar Co.*, 334 U.S. 219, 236 (1948).

II

Union argues that the judgment should be sustained on an alternate ground, urged upon the district court but not reached, that appellants' antitrust claim is barred by the four-year statute of limitations. 15 U.S.C. § 15b. Union reasons that appellants' cause of action rests upon the "lease-leaseback" agreements exe-

cuted December 21, 1955; that the last act causing injury which could conceivably involve Union was its consent to the assumption of the obligation of these agreements by Mr. Schroeder and Mr. Wisel and later by Transfare, Inc.; and that the operative force of this consent expired no later than May 18, 1958, when Hart and Transfare quitclaimed their interests to appellants.

Union views appellants' claim too narrowly. The alleged antitrust violation consists of Union's entire course of conduct directed to the establishment and maintenance of exclusive dealing arrangements with service station outlets in Fairbanks and other Alaska areas. Acts of Union in furtherance of this purpose, which appellants contend caused them injury and damage, included Union's efforts to prevent appellants from selling or leasing their station free of the exclusive dealing condition. These acts continued until the complaint was filed and thereafter. Thus, appellants' action is not barred even if the invasion of their interests is considered to have been episodic rather than continuous. See generally *Steiner v. Twentieth Century Fox Film Corp.*, 232 F.2d 190, 194-95 (9th Cir. 1956); *Highland Supply Corp. v. Reynolds Metals Co.*, 327 F.2d 725, 731-32 (8th Cir. 1964).

III

Appellants contend that the district court erred in denying their motion for summary judgment on the issue of liability. We do not agree. Exclusive dealing arrangements are not *per se* illegal. *Tampa Elec. Co. v. Nashville Co.*, 365 U.S. 320, 333, 335 (1961). It cannot be determined on the present record that Union's use of such arrangements was accompanied by such a purpose, or had such a probable effect, as would require their condemnation under the antitrust laws. See generally *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 467-69, 474-75 (9th Cir. 1964).

Reversed.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 2-7-67—210

No. 21210

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWIN E. LAWRENCE, CAROLEE LAWRENCE,

Appellants

v.

UNITED STATES OF AMERICA, UNITED STATES OF AMERICA, as Trustee, FLORA CRUZ, AUSTIN CRUZ,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES, APPELLEE

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FEB 15 1967

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 21210

EDWIN E. LAWRENCE, CAROLEE LAWRENCE,

Appellants

v.

UNITED STATES OF AMERICA, UNITED STATES OF AMERICA, as Trustee, FLORA CRUZ, AUSTIN CRUZ,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The district court did not write an opinion. The minute order of April 4, 1966, and the judgment of dismissal appear at pages 93-95 of the record.

JURISDICTION

Appellants' amended complaint in the district court asserted jurisdiction on the basis of 25 U.S.C. secs. 349 and 415, 28 U.S.C. sec. 1331, 28 U.S.C. sec. 1346(b), and 28 U.S.C sec. 2410. The United States contended, inter alia, that no jurisdiction existed in the district court. The judgment of dismissal, entered April 13, 1966, did not specify the grounds upon which the case was dismissed (R. 94). Timely notice of appeal was filed on June 9, 1966 (R. 97). The jurisdiction of this Court rests upon 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether the United States has consented to a quiet title action or a suit for specific performance where it holds lands in trust for Indian allottees.

2. Whether the allegation that employees of the Bureau of Indian Affairs negligently failed to issue a permit of occupancy to restricted Indian property states a claim upon which relief may be granted under the Federal Tort Claims Act.

3. Whether a contract touching restricted Indian trust property is absolutely null and void under 25 U.S.C. sec. 348

4. Whether the California statute of limitations would r this action in any case.

STATUTES INVOLVED

The Federal Tort Claims Act, 62 Stat. 933, as amended, U.S.C. sec. 1346(b), reads:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Exceptions to the Federal Tort Claims Act, 62 Stat. 4, as amended, 28 U.S.C. sec. 2680, read in part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

The Act of June 25, 1948, 62 Stat. 972, as amended, 28 U.S.C. sec. 2410, as here applicable,[1] reads:

> (a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.

The Act of February 8, 1887, 24 Stat. 389, as amended 25 U.S.C. sec. 348, reads in pertinent part:

> And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: * * *.

Pertinent sections of the California Code of Civil Procedure read as follows:

> Sec. 335.
>
> PERIODS OF LIMITATION PRESCRIBED. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:

1/ An amended form of this statute became law on November 2, 1966, Pub. L. 89-719, Title II; even if it had been earlie enacted it would not be applicable in this case.

Sec. 339.

Within two years. 1. An action upon a contract, obligation or liability not founded upon an instrument of writing, other than that mentioned in subdivision 2 of Section 337 of this code; or an action founded upon a contract, obligation or liability, evidenced by a certificate, or abstract or guaranty of title of real property, or by a policy of title insurance; provided, that the cause of action upon a contract, obligation or liability evidenced by a certificate, or abstract or guaranty of title of real property or policy of title insurance shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder.

STATEMENT

On December 1, 1955, Flora A. Cruz (one of the defendant-appellees in this case), a member of the Agua Caliente Band of Mission Indians, entered into a five-year lease with Carl King and Lulu King. The subject of the lease was a certain parcel of real property located on Highway 111 in the County of Riverside, Cathedral City, California (R. 3). This land was held in trust by the United States and allotted to the aforementioned Flora Cruz. This lease was subsequently approved by the Bureau of Indian Affairs (R. 52).

During the years 1956 and 1957, with the major portion of the lease to run, the Kings made certain improvements on the land. When this lease had expired in 1960, Mr. and Mrs Cruz refused to renew a lease of that length or enter into a longer one (Tr. 16).[2/] After negotiation, a permit to occupy the land was issued to the Kings on a yearly basis (Tr. 15). This permit was subsequently renewed on this basis (Tr. 25), and on May 1, 1964, Carl and Lulu King transferred their interest in the subject property to the appellants, Edwin E. and Carolee Lawrence, who apparently occupied the property on this same permit basis in subsequent years.

On September 17, 1965, appellants brought suit against Flora and Austin Cruz and the United States as trustee (R. 2). The complaint alleged an oral contract which was said to have arisen from an unwitnessed conversation between Carl King and Austin Cruz sometime in November 1956 (Tr. 6-9). Appellants sought specific performance plus $100,000 damages or in the alternative, $1,000,000 damages. Appellees filed separate motions to dismiss (R. 5,21), which were granted subject

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2/ Their references are to the deposition of Carl M. King.

ppellants' leave to file an amended complaint. Such amended omplaint was filed on March 1, 1966 (R. 44). It was essen-ially the same as the original complaint, except for the dded allegation that employees of the Bureau of Indian Affairs ad negligently failed to execute a permit regarding occupancy f a separate parcel of land (R. 47) allegedly leased 3/ to ap-ellants' donors (the Kings). The relief sought in this in-tance was the same as stated above, but included a prayer for 10,000 damages against the United States, arising from the al-eged negligence of employees of the Bureau of Indian Affairs, nd further sought to quiet title in the property involved on he basis of 28 U.S.C. sec. 2410 (R. 48).

Appellees once again filed motions to dismiss which ere based, inter alia, upon lack of jurisdiction (R. 65, 56). ppellants filed opposition to these motions (R. 83, 87), and he matter was heard on April 4, 1966. Thereafter, on April 3, 1966, the district court entered judgment granting the ap-ellees' motion and dismissing the cause with prejudice. Costs

---

/ The amended complaint contains no allegation as to how or upon what date this lease was to have come into existence.

were assessed against appellants (R. 94-95). This appeal followed.

SUMMARY OF ARGUMENT

1. The district court lacked jurisdiction of appellants' specific performance suit because of the doctrine of sovereign immunity. This Court has been explicit in refusing to allow specific performance against the United States, and sovereign immunity applies with the same force to lands held in trust for Indians by the United States.

28 U.S.C. sec. 2410, allowing suit by a person claiming an interest in real property on which the United States holds a lien, is inapplicable here because the United States has complete title to Indian trust properties. This statute is a limited waiver of sovereign immunity and in this instance neither the United States nor appellants come within its term

2. Appellants emphasize the entirely separate nature of their tort action. Taken alone, this negligence suit fails to state a claim upon which relief can be granted, in t it alleges no duty owed to appellants by appellees. Furtherm the issuance of a permit to occupy allotted Indian land is an tivity completely committed to the discretion of the Departme

f the Interior and, thus, the activity complained of herein learly falls within the "discretionary exception" to the Federal Tort Claims Act, 28 U.S.C. sec. 2680.

3. Furthermore, this suit is founded on a contract which s absolutely null and void ab initio unless approved by the ecretary of the Interior. Appellants' contentions that such contract is actionable without the Secretary's approval flies n the face of the clear mandate of 25 U.S.C. sec. 348 and goes gainst a consistent line of authority existent from the very eginnings of the Indian allotment system.

4. Finally, the record in this case illustrates on its ace that this action is barred by the California statute of imitations.

ARGUMENT

I

THE COURT HAD NO JURISDICTION OF A CLAIM FOR SPECIFIC PERFORMANCE

Essentially appellants' claim is one for specific performance of an alleged oral contract to lease the property to ppellants' predecessors. In White v. Administrator of General ervices Admin. of U.S., 343 F.2d 444 (1965), this Court noted

at page 446:

> From the beginning of its history, the United States asserted and maintained complete immunity from suit until Congress, by the Act of February 24, 1855, 10 Stat. 612, created the United States Court of Claims and gave consent for the United States to be sued for compensation for certain breaches of duty, one of which was breach of contract. The Act of March 3, 1887, 24 Stat. 505, 28 U.S.C. § 1346, conferred a partly parallel jurisdiction upon the United States District Courts. Those statutes have never been regarded as having given consent that the United States could be ordered by a court to specifically perform a contract.

The same sovereign immunity applies to lands held i trust by the United States as to lands **in** which it has a bene ficial interest. Minnesota v. United States, 305 U.S. 382 (1939). The litigation concerning the Palm Springs allotment (of which Arenas v. Preston, 181 F.2d 62 (C.A. 9, 1950), reli on by appellants (Br. 10-11), was one) was a series of cases based upon the consent to suit contained in 25 U.S.C. sec. 3 and has no bearing on this case.

The consent to suit in 28 U.S.C. sec. 2410 likewis has no bearing here. That statute applies only when the Uni

States claims a lien upon property. Wells v. Long, 162 F.2d 842 (C.A. 9, 1947), sustained the dismissal for lack of jurisdiction of a suit seeking specific performance of land to which the United States held title, rejecting attempted invocation of Section 2410. Accord, Shaw v. Rippel, 224 F.Supp. 77 (E.D. Ill. 1963). That decision, we submit, controls this case. And see fn. 11 of United States v. Brosnan, 363 U.S. 237, 247-249 (1960), setting forth the legislative history of Section 2410. The dismissal of the claim for specific performance was thus clearly correct.

II

THE COURT HAD NO JURISDICTION OF A CLAIM FOR DAMAGES UNDER THE FEDERAL TORT CLAIMS ACT

The amended complaint asserted a claim under the Federal Tort Claims Act, 28 U.S.C. sec. 1346(b). These tort allegations are admittedly related to an entirely separate and distinct parcel and alleged transaction from the one upon which the original complaint was based (Br. 9, 10). 4/

4/ Appellants concede that this mode of pleading could be attacked on grounds of misjoinder (Br. 10). More noteworthy is the fact that, although appellants' original complaint was dismissed with leave to amend, appellants did not amend but chose to include this additional "separate and distinct action" (Br. 10). Since the court presented no grounds for its dismissal, the question is raised whether, in dismissing the suit in this regard, the judge was exercising his sound discretion on the basis that appellants had failed to comply with his original order. See Kirsch v. Barnes, 157 F.Supp. 671, 672 (N.D. Cal. 1957), aff'd 263 F.2d 692 (C.A. 9, 1959).

Basic to any claim of negligence is the existence o a duty owed to the claimant. Taken alone, appellants' tort a legations (R. 47, pars. 14-17) are defective in that they sho no duty owed to the appellants by the appellees. Appellants make no showing that they had a right to the issuance of a pe mit. In fact, the complaint contains no allegation that any application for a permit to this separate parcel of property was ever filed. How, indeed could employees of the Bureau of Indian Affairs be negligent in failing to issue such an unso- licited permit?

Moreover, any occupancy permit must be based upon a right to occupancy arising from a lease or other authority. While appellants allege execution of a lease without further specification (R. 45), there is not even an allegation of de mental approval of any lease as required for restricted prop- erty. Even if application had been made, based on an approv lease, the issuance of such a permit by the Bureau of Indian Affairs is a purely discretionary activity. The Federal Tor Claims Act was not intended to be used to review the discret

f the Secretary of the Interior. 5/

The action of the Bureau of Indian Affairs in issuing ermits to allotted Indian lands was purely discretionary. The nited States, by virtue of its status of guardian for Indian llottees, is responsible for the protection of these Indians s long as they remain wards of the Government. Armstrong v. nited States, 306 F.2d 520 (C.A. 10, 1962). The purpose of he trust patent for an Indian allotment was to prevent the al- ottee from improvidently encumbering or alienating his land. klahoma v. Texas, 258 U.S. 574, 597 (1922). Thus, Congress as charged the Secretary with the duty of protecting the in- erests of the Indians in their allotted lands. To this end, 5 U.S.C. secs. 348, 392 and 415 provide that any contract ouching these lands, which is not approved by the Secretary, s absolutely null and void for all purposes. United States

---

5/ See Coates v. United States, 181 F.2d 816, 818 (C.A. 8, 1950), where the court quotes the Memorandum for the Ju- iciary Committee printed with the Hearings on the changes ade in H.R. 5373 by H.R. 6463, 77th Cong.,2d Sess., dated anuary 29, 1942 (p. 44):

> "It is neither desirable nor intended that the constitutionality of legislation, the legality of regulation, or the propriety of a discretionary administrative act, be tested through the medium of a damage suit for tort."

v. Emmons, 351 F.2d 603 (C.A. 9, 1965).

And there can be no doubt that the issuance of permi
falls within the purview of the Secretary's discretion. The a
plicable regulation, 25 C.F.R. sec. 131.1, defines these permi
as follows:

> (e) "Permit" means a privilege revocable at will in the discretion of the Secretary and not assignable, to enter on and use a specified tract of land for a specified purpose. The terms "lease", "lessor", and "lessee", when used in this part include, when applicable, "permit", "permitter", and "permittee", respectively. 6/

Likewise, the statutory authorization for the issua
of these permits is also clearly discretionary. 25 U.S.C. se
415 says that these restricted Indian lands may be leased "wi
the approval of the Secretary of the Interior." 7/ Approval n
essarily requires judgment and an exercise of the Secretary's
discretion. Thus, the failure to issue the permit complained

6/ Beside being revocable at will, permits are not assignabl
and, thus, the appellants here, the assignees, are not th
proper parties-plaintiff, even if any duty had existed.

7/ The above definition of a permit symbolizes a tenancy at
will and is authorized by the statute authorizing leases.

t here clearly comes within the exception to the Federal Tort laims Act found at 28 U.S.C. sec. 2680(a), which reads:

> The provisions of this chapter and section 1346(b) of this title shall not apply to--
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

ecoming more particular, an analogous situation was presented o the Tenth Circuit in Chournos v. United States, 193 F.2d 21, (C.A. 10, 1952), cert. den., 343 U.S. 977. There the ourt held that a suit based upon failure to issue a grazing ermit came within the exception of 28 U.S.C. sec. 2680(a) of he Federal Tort Claims Act, stating (pp. 323-324):

> It seems clear to us that the granting or rejection of the applications here was within the discretionary function of the range officials as contemplated by Sec. 2680(a) of the Federal Tort Claims Act. Sickman v. United States, 7 Cir., 184 F.2d 616, certiorari denied 341 U.S. 939, 71 S.Ct. 999, 95 L.Ed. 1366; Coates v. United States, 8 Cir., 181 F.2d 816, 199 A.L.R.2d 840; Cromelin v. United States, 5 Cir., 177 F.2d 275, certiorari denied 339 U.S. 944, 70 S.Ct. 790, 94 L.Ed. 1359; Kendrick v. United States, D.C. N.D. Ala., 82 F.Supp. 430.

The lack of jurisdiction of the asserted tort claim is, we sub mit, clear.

III

THE ALLEGED BASIS FOR THE SUIT FOR SPECIFIC PERFORMANCE IS A CONTRACT TOUCHING ALLOTTED INDIAN LANDS AND ABSOLUTELY NULL AND VOID

In this respect it is noted that appellants' complaint alleges a contract to be approved by the Secretary of the Interior (R. 46) and nowhere alleges that approval did in fact occur. Concerning such contracts, 25 U.S.C. sec. 348, which governs these allotted Indian lands, provides a clear mandate.

> And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: * * *.

Moreover, there exists a wealth of authority, datin from the early years of the allotment system to the present, giving effect to this clear mandate. United States v. Ricker, 188 U.S. 432 (1903); Sage v. Hampe, 235 U.S. 99 (1914); United States v. Hellard, 322 U.S. 363, reh. den., 323 U.S. 811 (194 United States v. Emmons, 351 F.2d 603 (1965).

IV

THIS CONTRACT ACTION WOULD BE BARRED BY THE CALIFORNIA STATUTE OF LIMITATIONS

This argument is treated summarily in the light of he clear mandate of Congress making such contracts null and oid, supra. However, California law would apply to a con- ract of this nature, could such be valid Guaranty Trust Co. . York, 326 U.S. 99 (1945). Thus, Section 339 of the Cal- fornia Code of Civil Procedure, would apply, requiring the ommencement of an action founded upon a contract not in riting within two years from the date the cause of action ccrues.

The deposition of Carl M. King (hereafter referred o as "Tr.") purports the alleged contracts to have taken lace in November 1956 (Tr. 5-6). Appellants did not file heir original complaint until September 17, 1965 (R. 2). his is a period of nine years and eight months. Appellants rgue that no refusal to perform on the part of the Cruzes ook place before June 6, 1965, and thus no cause of action rose until that date (Br. 18). We submit, however, that the ecord before this Court indicates the contrary.

In speaking of an attempted transfer of his inter

in this alleged lease to Merritt Trailer Sales in 1961 (Tr.

Carl King, an interested party, stated as follows (Tr. 21):

> MR. KING: A Well, I wanted to transfer the offer to Merritt Trailer Sales.
>
> MR. LAWRENCE: Q What did he [Austin Cruz] say?
>
> A He didn't say he wouldn't. He just didn't do it. He wouldn't do it. He didn't refuse to do it. That is, he didn't tell me, "I won't do it." He just wouldn't transfer it.

Also, a year previously, Mr. King was notified th

no lease would be executed (Tr. 24-25):

> MR. LAWRENCE: Q Mr. King, did you testify that in 1960, you were advised by Mr. Cruz that your five year lease would not be extended and that you would not be given a long term lease?
>
> MR. KING: A That's right. He [Austin Cruz] come out to the park and told me that, he and Mrs. Seva [Flora Cruz] both.

Since Rule 9(f) of the Federal Rules of Civil Pr

cedure makes averments of time material in testing the suf

ficiency of a complaint, this action is barred by the stat

of limitations.

Thus, in the light of this, plus the statute of frauds
sue that is raised by the lack of any memorandum, it appears
e district court could properly have dismissed the complaint
rely on the grounds of local law. 8/

CONCLUSION

For the foregoing reasons, we respectfully submit that
e dismissal of this case should be affirmed.

Respectfully submitted,

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BRUARY 1967

It is understood that counsel for Mr. and Mrs. Cruz will brief arguments on the California statute of frauds and atute of limitations in greater depth. Because of this ct and what is felt to be the persuasiveness of the federal sues dealt with supra, only the above is noted.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing is in full compliance with those rules.

JOHN G. GILL, JR.
Attorney, Department of Justice
Washington, D. C., 20530

No. 21213

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ADOLPH WEINBERG and ETTA WEINBERG, SUGAR DADDY, INC., *et al.*,

Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPELLANTS' PETITION FOR REHEARING.

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APPELLANTS' PETITION FOR REHEARING.

Petitioners Adolph Weinberg and Etta Weinberg and petitioner corporations Sugar Daddy, Inc., *et al.*, pursuant to Rule 23 of Rules of the United States Court of Appeals for the Ninth Circuit, respectfully petition this Court for a rehearing in the above-entitled cause.

It is respectfully submitted that a rehearing should be granted on the following grounds:

First, generally that his Court, in affirming the decisions of the Tax Court on the ground that "the Tax Court was not clearly wrong," considered this cause as presenting for review, factual questions only, which required this Court to affirm the Tax Court decisions unless found to be "clearly erroneous," when such decisions were mixed questions of fact and law and conclusions of law and were predicated upon the interpretation and construction of writings, all of which questions, conclusions and interpretations are required to be reviewed

by this Court independently and without any presumption in favor of the Tax Court.

Next, specifically that this Court failed to apply the proper standard of appellate review by the application of the "clearly erroneous" rule to the decisions of the Tax Court that cash and not crops were transferred when such decisions were predicated upon (a) disregard and rejection of an express stipulation of ultimate fact, and (b) disregard of the notice of deficiency, each stating that farm crops were transferred. This Court should independently, and as a matter of law, interpret and construe the stipulation and notice of deficiency.

Next, specifically that this Court failed to apply the proper standard of appellate review by the application of the "clearly erroneous" rule to the decisions of the Tax Court that cash and not crops were transferred when such decisions constitute ultimate facts or a mixed finding of fact and conclusion of law, thus requiring appellate review to determine independently whether the probative or evidentiary facts justify as a matter of law the ultimate fact or conclusion of law.

Next, specifically that this Court failed to apply the proper standard of appellate review by the application of the "clearly erroneous" rule to the decisions of the Tax Court that cash and not crops were transferred when such decisions were induced by an erroneous concept of the law of the State of California governing the transfer of crops and when such decisions were induced by a misapprehension of the legal effect of the acts and utterances (oral and documentary) of petitioners, to wit: after finding that petitioners intended to transfer crops and that this was objectively mani-

fested, the Tax Court concluded that crops were not transferred because there was no tangible evidence of a transfer of crops. The rule of law to be applied by this Court is that transfers of farm crops are determined by the objectively manifested intention of the parties.

Next, specifically that this Court failed to apply the proper standard of appellate review by the application of the "clearly erroneous" rule to the decisions of the Tax Court that cash and not crops were transferred when such decisions rested primarily upon the interpretation of writings, to wit: the notice of deficiency, the written stipulation of facts the written minutes of the corporations, and the written notices of transfer of crops, each of which must be independently construed and interpreted.

That on the basis of the foregoing grounds, each and all, substantial legal issues were not considered by this Court and for these reasons petitioners respectfully request that a rehearing of this case be granted.

Respectfully submitted,

DEMETRIOU & DEL GUERCIO,
Attorneys for Appellants.

Certificate.

I certify that in my judgment the foregoing Petition for Rehearing is well founded and that it is not interposed for the purpose of delay.

RICHARD A. DEL GUERCIO.

NO. 21215

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRED R. MORALES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

FILED

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NO. 21215

IN THE UNITED STATES COURT OF APPEALS

FRED R. MORALES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT AND STATEMENT OF THE CASE

The appellant, Fred R. Morales, was indicted on February 26, 1964, by the Federal Grand Jury for the Southern District of California, Central Division. 1/

This indictment charged appellant in three counts for violations of Section 174, Title 21, United States Code. Count One charged him, in substance, with the unlawful concealment and facilitation of concealment of 6 grams, 610 milligrams of heroin which, as the defendant then and there well knew, had been

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1/ C. T. 2, "C. T." refers to Clerk's Transcript of Proceedings.

imported into the United States contrary to law. Count Two charged that he unlawfully concealed and facilitated the concealment of 141 grams, 770 milligrams of heroin, while Count Three charged he unlawfully concealed and facilitated the concealment of 96 grams, 905 milligrams of heroin. The indictment charged that all three offenses took place on February 6, 1964 [C. T. 2, 3, 4].

In all counts it was alleged that Patricia Ann Morales was a codefendant. However, on April 20, 1964, following a hearing, a motion to suppress evidence was granted as to codefendant Patricia Ann Morales, but denied as to appellant. On April 27, 1964, the indictment as to Patricia Ann Morales was dismissed on motion of the Government.

On April 28, 1964, the first jury trial in this case commenced, and appellant was found guilty on April 29, 1964. On May 25, 1964, appellant was sentenced to six years on each of the counts, said sentences to run concurrently. An appeal was taken from that judgment, and the case was reversed and remanded on May 1, 1965, by the United States Court of Appeals, Ninth Circuit. Morales v. United States, 344 F. 2d 846 (9 Cir. 1965).

On August 30, 1965, before the Honorable Roger D. Foley, United States District Judge, jury trial again commenced, and appellant, on August 31, 1965, was again found guilty as charged [C. T. 32, 33, 34].

On January 31, 1966, appellant was sentenced by Judge Foley, to imprisonment of seven years on each count, the

sentences to run concurrently [C. T. 35].

Notice of appeal was filed in a timely manner, on February 2, 1966 [C. T. 37, 38], and permission to proceed in forma pauperis was granted on February 2, 1966 [C. T. 39].

The District Court had jurisdiction of the case under Title 28, United States Code, Sections 3231 and 3237.

This Court has jurisdiction under Sections 1291 and 1294, Title 28, United States Code.

II

STATUTES INVOLVED

Each count in the indictment was based upon Title 21, United States Code, Section 174, which provides in pertinent part as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than

five or more than twenty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

III

STATEMENT OF FACTS

On August 6, 1964, Deputy Sheriffs from the Orange County Sheriff's Office and the Los Angeles County Sheriff's Office went to appellant's home, at 10228 Regatta Street, in Whittier, California, where they arrested appellant's wife, pursuant to some warrants. 2/ Appellant was present in the house at the time of his wife's arrest [R. T. 50].

Incident to this arrest, a search of the house was conducted. A man's suit coat was found hanging in the bedroom closet [R. T. 38]. The outer breast pocket of the suit coat contained a handkerchief in which was wrapped, what was later determined to be, 6.610 grams of heroin [R. T. 38, 31]. In the outer left coat pocket three rubber containers were found which proved to contain 141.770

2/ R. T. 35, 36. "R. T." refers to Reporter's Stenographic Transcript.

grams of heroin [R. T. 38, 31]. And in the inside breast pocket of this coat a rolled up newspaper was discovered which held 96.905 grams of heroin [R. T. 38, 39, 31, 32].

Appellant came into the bedroom and was asked to whom the man's suit coat and heroin belonged. Appellant answered that it was his [R. T. 47, 52].

At the time he made this admission, appellant was under arrest and, to a certain degree, under the influence of a narcotic [R. T. 54], but was not in a high state of intoxication [R. T. 57]. He was not "drunk" from the narcotics [R. T. 60]. Rather, he was only "slightly under the influence of a narcotic" [R. T. 61].

There was no testimony offered, requested, or objected to, as to whether or not the appellant had been advised of any constitutional rights prior to admitting that the man's suit coat hanging in his bedroom closet was his own.

IV

ARGUMENT

A. APPELLANT HAS PRESENTED NO "EXCEPTIONAL CIRCUMSTANCES" WHICH WOULD ALLOW HIM TO RAISE QUESTION OF DENIAL OF FIFTH AND SIXTH AMENDMENT RIGHTS FOR THE FIRST TIME ON APPEAL.

Appellant's brief repeatedly contends that appellant was not warned of his constitutional rights prior to admitting, at his home,

that the coat which was hanging in the bedroom closet was indeed his own. An examination of the Reporter's Transcript, however, discloses no testimony, one way or the other, regarding what constitutional warnings had been given the appellant at the time of his arrest. This issue was never raised before the trial court.

As the Ninth Circuit has stated, in Moore v. United States, 161 F. 2d 932, 933, cert. denied, 67 S. Ct. 1746, 331 U. S. 857, 91 L. Ed. 1864:

> " . . . It may not be doubted that while normally a defendant may not claim a reversal except for error duly saved and assigned, this court has the power to reverse, notwithstanding no objection was made and no exception taken, when justice requires (citations). But this does not mean the appellate court will retry the case as a jury would . . . when a defendant is convicted, as appellant here was, on a fair charge and on a trial containing no objections or exceptions to its course and conduct, only the strongest kind of showing that justice has miscarried will avail him." (Emphasis added).

The Government contends that no such "strongest kind of showing that justice has miscarried" has been made by appellant.

The Government first wishes to point out that the case of Miranda v. Arizona, 384 U. S. 436 (1964), has no application to this appeal. Only Escobedo v. Illinois, 378 U. S. 478 (1964) could

be applicable, since appellant's trial took place on August 30 and 31, 1965. Johnson v. New Jersey, 384 U.S. 719 (1966).

Appellee next cites Williams v. United States, 358 F.2d 325 (9 Cir. 1966) as being squarely on point. In that case, the appellant raised the following specification of errors:

1. Appellant was not advised of his right to remain silent, nor of his right to have counsel at all stages of the proceedings.

2. Statements and admissions of the appellant made at the time of arrest were used against him at his trial without laying a proper foundation.

In ruling on those two points, this Court stated, at page 329:

> "We find no error. The record does not support the claims of appellant that he was in any way denied the assistance of counsel or that he was not warned of his constitutional rights. No opportunity was given to the trial court to inquire into the claims now asserted by appellant. The appellant elected not to testify in the proceedings and offered no testimony tending to show a denial of constitutional rights. The claimed errors are not properly before this Court and we find no good cause why these errors should be reviewed for the first time on appeal. (citations)"

This same issue was similarly decided in Benjamin Franklin Boland v. United States, ___ F.2d ___ (9 Cir. No. 19,928, decided August 12, 1966).

Likewise, in the case of Dearinger v. United States, 344 F. 2d 313 (9 Cir. 1965), this Court noted, at page 313:

> ". . . (Appellant) asserts that he was not represented by counsel during a period between arrest and trial, and that there was unauthorized communication between a third person and certain jurors during trial. Neither contention was made to the trial court, and both rest upon assertions of fact wholly outside the record. They present nothing which we can review in this proceeding. (citations)"

In connection with the instant case the Government wishes to point out the following factors. The case of Escobedo v. Illinois, 378 U. S. 478, was decided on June 22, 1964. Appellant Morales was first tried and convicted, on April 28 and 29, 1964. Thereafter he appealed and the case was reversed on May 1, 1965. The Court specifically noted, at page 849, that:

> "Morales has been ably defended by court appointed counsel, both here and in the court below."
>
> Morales v. United States, 344 F. 2d 846 (9 Cir. 1965).

The same attorney who represented Morales at the first trial and on the first appeal, represented appellant at the re-trial. This re-trial took place on August 30 and 31 of 1965 [C. T. 32-33], over a full year after the decision in Escobedo v. Illinois, supra. There were no questions or objections made, whatsoever, during the

course of the re-trial, regarding what constitutional warnings had been given the defendant prior to his making of the statement in his home that the coat hanging in his bedroom closet was his own.

Furthermore, on both occasions when counsel moved to strike that admission, he specifically limited the grounds to the contention that appellant was under the influence of a narcotic drug [R. T. 61, 80].

The Government submits that the instant case presents no more "exceptional circumstances" requiring review of this question than did the Williams and Toland cases cited above.

B. A PRELIMINARY DETERMINATION OF VOLUNTARINESS OUTSIDE OF THE JURY'S KNOWLEDGE WAS MADE IN CASE.

The assertions now raised on appeal that appellant was so narcotized at the time of his arrest as to render his statements inadmissible were heard and decided at appellant's first trial. The record went before the Ninth Circuit, and this Court, speaking through Judge Ely, stated:

> "The receiving into evidence of the admissions made by Morales immediately before and after his arrest is challenged upon the assertion that since Morales was under the influence of narcotics, it necessarily follows that his faculties were impaired to an extent such as to compel a conclusion that the

admissions were made involuntarily. The record does not support the factual premise upon which the point is based. While there was evidence, as stated above, that Morales appeared to be 'slightly under the influence of narcotics,' there was also evidence that during the time that the conversations at the place of arrest, the speech of Morales was not impaired and that he answered questions in such a manner as to negate the then existence of drug induced mental disability. In this state of the record, there is no justification for disturbing the determination of the trial judge as to the propriety of receiving the incriminating admissions into evidence. (citations)" (Emphasis added).

Morales v. United States, 344 F. 2d 846 (9 Cir. 1965).

The case was reversed upon other grounds involving a different confession, however, and upon re-trial, appellant renewed his motion to suppress. The following colloquy was had between the court and defense counsel:

"THE COURT: Well, the Court of Appeals ruled against you, didn't they?

"MR. VISICK: That is correct. Well, the Court of Appeals, in the opinion, said that the evidence was properly admitted by the trial court, but did not base its opinion upon that point. The opinion merely

is based on the point that a confession was admitted which should not have been admitted and reversed. So, it seems to me, that any other statements are really dicta since any other point which would have required reversal was decided.

"THE COURT: Well, I am going to deny your motion at this time. You may renew it at the time the evidence is offered. But, to the extent that the Court of Appeals, I thought, with great care detailed the history of the evidence and specifically rejected appellant contention, I think the law of the case is certainly established." (Emphasis added). [R. T. 25].

The Government submits that the issue of the effect of the narcotics upon the defendant was resolved thrice in favor of voluntariness, and incorporated by the above reference into the re-trial. It was decided once by Judge Yankwich at the first trial, and then by the jury there, and, finally, upon review in this Court. That all parties understood it to have been so determined is further indicated by the fact that even though the re-trial took place over a full year subsequent to the opinion in Jackson v. Denno, 378 U. S. 368 (decided June 22, 1964), there never was any request either by the defense counsel, by the Government, or by the court, for another hearing on the question of voluntariness outside of the jury's presence. And there was never an offer by appellant to produce new evidence not heard at the first trial.

Here, there had been an independent determination of voluntariness made "prior to the admission of the confession to the jury which (was) adjudicating guilt or innocence". Clearly the requirements of Jackson v. Denno, supra, were satisfied.

Appellant's contention that allowing the jury to further decide the question of voluntariness would require reversal is without merit. Once, as here, an independent determination of voluntariness is made in the absence of the jury, final appraisal of the confession may be left with the jury. This course -- sometimes called the "Massachusetts doctrine" -- was approved in Jackson v. Denno, and has the benefit of avoiding "grave questions of Constitutional law, such as whether the entitlement to a jury trial does not compel jury determination of the validity of a confession". United States v. Inman, 352 F. 2d 954, 956 (4 Cir. 1965).

CONCLUSION

A review of the record indicates no error prejudicial to the rights of appellant and, accordingly, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William J. Gargaro, Jr.
WILLIAM J. GARGARO, JR.

No. 21216

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HARRY C. KNOWLES,

Appellant,

vs.

CLARENCE T. GLADDEN, Warden,
Oregon State Penitentiary,

Appellee.

- - - - - - - - -

APPELLEE'S BRIEF

- - - - - - - - -

Appeal from the United States District Court

For the District of Oregon

HONORABLE BRUCE R. THOMPSON, Judge

- - - - - - - - -

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the advice of competent counsel waived all nonjurisdictional defects in prior proceedings or defenses he may have had including the purported defense that his prior statements of guilt were involuntary and inadmissible.

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APPELLEE'S BRIEF

I

STATEMENT OF JURISDICTION OF UNITED STATES DISTRICT COURT AND COURT OF APPEALS FOR NINTH CIRCUIT

Appellee joins in the statement of jurisdiction set forth at page 2 of Appellant's Brief.

II

APPELLEE'S STATEMENT OF THE CASE

Appellee does not join in the statement of the case prepared by appellant and herewith sets forth his own statement of the case.

A. Appellant's Grounds for Relief as set Forth in the Amended Petition.

In paragraph 4, page 2 of his petition (R 5), and at paragraph 39 (R 12) petitioner summarizes his grounds for relief as follows:

> "Your Petitioner bases this petition for a writ of habeas corpus upon the ground that his plea of guilty, entered on December 24, 1954 to the information filed in the Circuit Court of Oregon, Wasco County, charging him with murder in the second degree, <u>was made under circumstances rendering it involuntary</u> and in violation of Your Petitioner's rights under the Sixth and Fourteenth Amendments of the Constitution of the United States." (Emphasis supplied)

> "On Friday, December 24, 1954, Your Petitioner again appeared before the Circuit Court of Oregon for Wasco County. As a result (a) of the circumstances surrounding

> Your Petitioner's earlier confessions of guilt rendering said confessions involuntary and in violation of Your Petitioner's right to counsel, (b) Your Petitioner's ignorance of the legal significance of those circumstances, (c) Your Petitioner's ignorance at the time the confessions were obtained of his right to counsel and of his right to remain silent, and (d) as a result of the representations made by the District Attorney and the advice of his court appointed attorney, Your Petitioner signed a waiver of indictment and entered his plea of guilty to an information charging him with second degree murder."

Appellee filed an answer (R 57-63) putting in issue appellant's grounds for relief.

B. Judgment of the Court Below

After a trial of the issues of fact raised by the pleadings the court issued its Findings of Fact, Conclusions of Law and Judgment dismissing the petition which are set forth verbatim as an appendix to this brief (R 78-90, A-3 to A-16).*

The trial court found as a fact that the appellant voluntarily and with full understanding of the consequences plead guilty to the offense of second degree murder; that appellant's decision to plead guilty was reached voluntarily after consideration of the advice of competent counsel; that such decision was not the product of a promise of recommendation for an early parole because there was no such promise; and that the decision to plead guilty admittedly was influenced by the prospect of

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* The reference "A" in parenthesis followed by a number indicates a page reference to the appendix to this brief.

appellant's facing a charge of first degree murder (R 89-90, A-14 to A-15).

C. Appellee's Statement of the Facts*

1.

Introduction

Pages 3-16 of appellant's statement of the facts deal with background events occurring prior to appellant's plea of guilty.

Inasmuch as appellant's own testimony indicates that he did not want to plead guilty but did so because of his counsel's advice, see pp 12-14, infra, the prior statements appellant gave the police and the background events in which they occurred were not, so far as appellant was concerned, a factor in appellant's decision to plead guilty.

Accordingly, we deem this portion of appellant's statement neither necessary nor relevant to the decision in this case. In the event, however, that this court may wish to examine our version of such background events, and because the lower court made findings thereon, and because we do not entirely agree with the way appellant has set forth such events, we have set them forth in the appendix to this brief at pp A-31 to A-48.

---

* Inasmuch as a substantial portion of our statement of facts will be the same as the lower court's findings of fact, we will add to the references to the record the abbreviation "Opin" when the fact recited is the same as that found by the court. References to the findings of the court will also include references to the appropriate pages of the appendix to this brief where the referred to portion of the lower court's findings may be found.

Facts Pertaining to Appellant's Plea of Guilty

On Tuesday afternoon, December 21, 1954, appellant arrived at The Dalles, Oregon, in the custody of the Sheriff of Wasco County, Oregon, and in the company of District Attorney Donald Heisler of Wasco County. (R 27, par 34, R 61, par XXII, Opin R 87, A-12, Tr 118).

Appellant, who had been awaiting sentencing by the Federal Court in Sacramento, California, on a Dyer Act charge (Ex 3, pp 1-4), had been released by the federal authorities in Sacramento to the Oregon authorities for a ten day period (Ex 3, p 7) on a writ of habeas corpus ad prosequendum issued out of the Wasco County Circuit Court. (R 27, par 31, 32, R 61, par XXII, Opin R 87, A-12). At the time the writ was issued a charge of second degree murder was pending in The Dalles, Oregon Justice Court. (Tr 133; Opin R 86-87, A-12).

On Wednesday morning, December 22, 1954, the District Attorney of Wasco County, Donald Heisler (Tr 118) after arranging to have appellant's case heard that morning by the Circuit Court of Wasco County, visited appellant in the Wasco County Jail. Although Heisler had a conversation with appellant, he did not represent to appellant that if appellant would waive indictment and plead guilty to an information charging second degree murder he (Heisler) would recommend an early parole (Tr 126-127, 129, 130; Opin R 87, A-13).

At the conclusion of Heisler's conversation with appellant,

ppellant was taken directly before the Circuit Court* of Wasco County although appellant had not been arraigned in Justice Court on the information filed there, given an opportunity for a preliminary hearing, or indicted by the grand jury (R 28, par 36, 61-62, par XXIV, Opin R 87, A-13). This procedure presupposed that appellant would waive preliminary hearing and indictment Tr 133; Opin R 87, A-13).**

When appellant appeared in the circuit court that morning, e sought to waive counsel and plead guilty, but the court declined to permit him to do so and appointed Sam Van Vactor, n attorney practicing in The Dalles, Oregon, to represent him. Ex 2, pp 1-4; A-18 to A-21, Opin R 88, A-13).

When the Wasco County Circuit Court refused to permit appellant to plead guilty appellant stated (Ex 2, p 3, A-20):

"MR. KNOWLES: Well, Your Honor, could I say something, please?

THE COURT: Yes.

MR. KNOWLES: I can't understand why -- I can't see any sense of having an attorney. I've already committed the crime and admitted it and I'd kind of like to have this over with." (Emphasis supplied)

---

* The transcript of the proceedings of appellant's appearances efore the Circuit Court of Wasco County is Exhibit 2. Said xhibit is set forth verbatim in the appendix to this brief (pp -17 to A-30) except for the scribbled comments appearing at pages and 11 of said exhibit which comments appellant on deposition not of record here) admitted to be his. These scribbled comments ere made several years after appellant's conviction and after he ad apparently learned to read and write.

** But see argument pp18-19, infra.

Appellant thought the above quoted statement in his first appearance in court constituted a plea of guilty, because, as he described it in his testimony, he wanted to "change his plea" but his appointed counsel advised him not to. (Tr 50-51, 57-58).

Van Vactor, appellant's appointed attorney, had practiced as an attorney since 1932 (Tr 69).

After his appointment he made the usual investigation an attorney normally makes (Tr 70). He conferred with appellant and obtained appellant's story and discussed the case with the district attorney (Tr 70, 71; Opin R 88, A-13). He attempted to verify the information he received (Tr 71).

Because of the lapse of over 11 years since he had represented appellant (December 1954 to January 14, 1966, the date of the trial below) he was not able to remember what specific advice he gave appellant (Tr 70).

However, he did write a letter* in which he advised appellant as to parole entitlement under the various charges which Van Vactor felt appellant ought to know and which letter included what Van Vactor thought were "the various possibilities that were involved and what I considered the serious nature of the situation at that time" (Tr 70).

Van Vactor gave the letter to appellant and assumed that appellant read it (Tr 74) as appellant did not tell Van Vactor that he couldn't read (Tr 75).

---

* Appellant didn't produce the letter and Mr. Van Vactor no longer had his copy (Tr 73-74).

Van Vactor also advised appellant that he would receive a life sentence on his plea of guilty to second degree murder (Ex 2, p 11; A-27 to A-28).

Appellant was also advised of his right to have his case presented to the grand jury or, if he so chose, to consent to the district attorney filing an information. (Ex 2, p 5; A-21 to A-22).

Appellant told Van Vactor of his prior confessions but did not explain the details or the circumstances which led to them (Tr 72; Opin R 88, A-13). Nor did appellant mention his conversation with Heisler. (Tr 49-50; Opin R 88, A-13).

Van Vactor's recollection was that he was not shown the written statements which had been obtained from appellant (Tr 72; Opin R 88, A-13).*

He felt, however, that he had had adequate time to investigate the case and felt that he was in possession of sufficient facts to advise appellant (Tr 75-76).

Van Vactor thought that if appellant went before the grand jury, appellant would be indicted for first degree murder and this fact weighed heavily with Van Vactor ** (Tr 70; Opin R 88, A-13)

---

* If Van Vactor had seen Exhibit 6, the CII transcript of appellant's statement he would have, of course, read the cautionary statements on p 1 thereof (see A-43) as well as the similar comments at p 15 thereof (see foonote A-15). The same holds true for Exhibits 4 and 5.

** In 1954 and 1955 conviction of first degree murder in Oregon carried a mandatory death sentence, except where the trial jury in its verdict recommended life imprisonment, in which case the penalty was life imprisonment. Former ORS 163.010 (1953 Replacement Parts), quoted p 16, infra.

He also believed that the confessions would be admissible and a major factor in the trial, and he advised appellant of this fear and of his evaulation of the case. (Tr 50, 70-72, 76; Opin R 88, A-13 to A-14).

As a result of this advice appellant waived indictment and plead guilty to an information charging him with second degree murder on December 24, 1954. (Ex 2, pp 4-8; A-21 to A-24; Tr 48, 50, 51, 57-58; Opin R 88, A-14).*

Appellant was sentenced to life imprisonment on December 29, 1954. (Ex 1; Ex 2, pp 10-13; A-26 to A-29, Opin R 88, A-14).

III

QUESTION PRESENTED FOR DECISION TO THE NINTH CIRCUIT

Is the lower court's finding of fact that appellant voluntarily plead guilty because of the advice of his court appointed attorney manifestly erroneous?**

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* The relevant portions of the transcript are quoted infra, pp 12-13.

** " * * * Rule 52 (a) of the Federal Rules of Civil Procedure provides that findings of fact by the District Court shall not be set aside on appeal unless clearly erroneous, and this principle of appellate review applies as well as to habeas corpus proceedings as to other cases. Palakiko v. Harper, CA 9, 209 F.2d 79." Barber v. Gladden, 327 F2d 101, 103-104 (9th Cir. 1964)

A finding of fact is "clearly erroneous" when " * * * the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 US 364, 395, 92 L ed 746, 766 (1948).

This question arises by virtue of this appeal challenging the correctness of the lower court's findings and, particularly, appellant's assignments of error Nos. 15, 16 and 18.

IV

SUMMARY OF ARGUMENT

The court properly found from the evidence that appellant's plea of guilty was voluntarily entered and that the decision to plead guilty was based on the advice of competent counsel and that such decision was influenced by the prospect of a first degree murder charge and the gas chamber.

The circumstances attending appellant's prior interrogations and confessions played no part in appellant's decision to plead guilty, particularly because the Wasco County Circuit Court manifested to appellant in unmistakable terms that that court was there to protect appellant's rights.

Furthermore, appellant's own testimony clearly shows that he wanted to plead not guilty but decided to plead guilty only after his counsel, who was concerned about the prospect of a first degree murder charge and the gas chamber if the state's case were contested, and who determined that appellant's prior confessions would be admissible, advised appellant to plead guilty.

It may be presumed that counsel advised appellant that his confessions would be inadmissible in evidence if coerced.

A plea of guilty under such circumstances is a waiver of all prior defects in the proceedings and of all defenses, and

as long as there is no allegation and proof of incompetent counsel (and there are none in this case) the court need not try the merits of counsel's advice nor inquire into counsel's mental processes in giving such advice.

V

APPELLEE'S ANSWER TO APPELLANT'S ASSIGNMENTS OF ERROR 15, 16 AND 18

The trial court did not err in finding that appellant's plea of guilty was voluntarily entered upon the advice of competent counsel and because of the possibility that appellant would be indicted for first degree murder if the state's case was contested.

POINT AND AUTHORITIES NO. 1

Appellant's own testimony as well as that of his counsel clearly shows that appellant plead guilty to second degree murder because of the advice of his counsel so to do and because of the possibility of appellant being indicted for first degree murder if the state's case were contested.

United States v. Bayer, 331 US 532, 540-541, 91 L ed 1654, 1660 (1947)

Covey v. State, 232 Ark 79, 334 SW2d 648, 651 (1960)

Hagan v. Goldberg, 291 F2d 249, 251 (9th Cir 1961)

Brooks v. School District of Moberly, Missouri, 267 F2d 733, 739-740 (8th Cir 1959)

Jensen v. Gladden, 231 Or 141, 144, 372 P2d 183 (1962)

ORS 51.040 (1953 Replaced Parts)

ORS 51.050 (1953 Replaced Parts)

ORS 133.030 (2)

ORS 133.610 (1957 Replaced Parts)

ORS 133.620 (1957 Replaced Parts)

ORS 133.630 (1957 Replaced Parts)

ORS 135.310 (1957 Replaced Parts)

ORS 135.320 (1957 Replaced Parts)

ORS 161.030 (1) (1953 Replaced Parts)

ORS 163.010 (3) (1953 Replaced Parts)

Rule 52 (a) Federal Rules of Civil Procedure

ARGUMENT

The basic ground of appellant in this case as set out in his amended petition is that his plea of guilty was involuntary. See pp 1-2, supra.

In turn this ground rests on allegations (1) that his earlier confessions were involuntary and in violation of his constitutional rights and (2) of promises of the district attorney to recommend an early parole. See pp 1-2, supra.

Appellant's own unprompted testimony on direct and cross-examination, however, which we have quoted at length at pp 12-13, infra, clearly shows that appellant, far from being affected by his earlier confessions or the alleged promises of the district attorney to recommend an early parole, did not want to plead guilty and only did so because of the advice of his counsel.

(Tr 50, 51, 57-58).

It is true that when appellant first appeared before the Wasco County Circuit Court he told that court that he didn't want an attorney, that he had committed the crime and that he had confessed it, and that he wanted to get the court proceedings over with. (Ex 2, pp 3-4, A-20). However, the Wasco County Circuit Court refused to go along with appellant and appointed counsel for him. (Ex 2, pp 3-4, A-20).

But after this initial appearance, appellant's attitude changed and he didn't want to plead guilty. Thus although appellant construed his first appearance as a plea of guilty, in his testimony he kept reiterating that he wanted to "change his plea" and stated "I just didn't feel that I should plead guilty to second degree murder" (Tr 57) but that his attorney advised against it (Tr 50, 51, 57-58).

Thus at pp 50-51 of the transcript the following appears:

"Q So you explained, then, your decision then to plead guilty to the court?

A My decision to plead guilty?

Q Yes.

A Well, I wanted to change my plea from guilty to not guilty on this second degree murder charge, and I had talked with him about that, and he advised me not to.

Q Well, explain the discussion, Mr. Knowles.

A Well, that is it. That is the discussion, that is what we were discussing about. And I got kind of confused on that. I was thinking it was after I had pleaded guilty in court that I wanted to change my plea, but it wasn't; it was at the time I was up for

arrangements, and I thought I was pleading guilty at that time.

Q What you are saying is you initially didn't want to plead guilty although you thought you had already done so?

A That is right.

Q But you hadn't?

A But I hadn't; that is right. And I asked him if I could change my plea." (Emphasis supplied)

On cross examination we asked appellant (Tr 57):

"Why did you want to change your plea?"

Appellant answered (Tr 57-58):

"Well, I just didn't feel that I should plead guilty to second degree murder at the time. But I didn't really know much about court proceedings. Of course, I know now that I was doing wrong at the time, but after I had talked to my attorney, then he explained to me that it would be quite dangerous if I changed my plea, and that is why he advised me to still stick to the first degree murder -- excuse me -- to the second degree murder and plead guilty of it.

Q You relied on the advice of your counsel?

A Yes, sir. He was very honest with me." (Emphasis supplied)

The unprompted answer of appellant on cross-examination as to why he plead guilty and appellant's other testimony on direct examination quoted above negative the existence of any alleged coercion, negative the existence of any promises of an early parole (expectation of parole wasn't the reason appellant gave for wanting to change his plea) and clearly shows that it was appellant's own counsel's fear of the gas chamber that prompted

the plea of guilty.

It is not surprising that appellant felt no mental effect arising from his earlier interrogations by the police. For in appellant's initial appearance the circuit court had refused to permit appellant to waive an attorney and had refused to permit appellant to get it over with in a hurry. (Ex 2, pp 1-4, A-18 to A-20).

Thus at pp 3-4 of Ex 2 (A-20 to A-21) the following appears:

"MR. KNOWLES: I can't understand why -- I can't see any sense of having an attorney. I've already committed the crime and admitted it and I'd kind of like to have this over with.

THE COURT: Well, it can move along as fast as you desire, but the only thing is, Knowles, that I want to be sure that you're fully advised of your legal rights and you can explain whatever you wish to your attorney, take that matter up with him, and it will proceed in an orderly way. Your attorney will look after advising you in that respect and I want to know that everything is proper. The court is entitled to know that you are fully advised, you see, of every step that you take. If you want to plead guilty to the charge that's your business but you should be fully advised and have competent legal advice, particularly on a charge of murder in the second degree which is placed against you. Now, as to whether or not it would delay this matter or not, that's a thing for your and your attorney to discuss. I think that covers it. Mr. Van Vactor is here and he'll talk to you. That will be all then at this time.

MR. KNOWLES: Thank You." (Emphasis supplied)

Whatever mental affect* the earlier interrogations conceivably could have had on appellant was swept away by the court's forceful refusal to permit appellant to waive an attorney and be done with it and the court's forceful advice to appellant that appellant was entitled to be fully advised before he took further action.

In effect the court let appellant know in unmistakable terms that the court was there to protect appellant, particularly when the court said to appellant " * * * The Court is entitled to know that you are fully advised, you see, of every step that you take. * * *" (Ex 2, p 3, A-20).

In the foregoing context appellant's testimony that it was his desire to plead not guilty but that he plead guilty because of the advice of his counsel (Tr 50, 51, 57-58) is reasonable.

In this regard appellant's appointed counsel Van Vactor testified (Tr 70):

> "I will state to you that in my own mind -- he had not yet gone before the grand jury --

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* In United States v. Bayer, 331 US 532, 540-541, 91 L ed 1654, 1660 (1947) the court said:

> "Of course after the accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed."

> I felt that if he did go before the grand jury that they would indict him for first degree murder. And that did weigh very heavily with me at the time, and I am sure I mentioned that to him."

Counsel had a right to be worried. A mistake on his part could have meant the gas chamber for his client. Thus former ORS 163.010 (3) (1953 Replaced Parts) as it existed in 1954 and 1955 provided as follows:

> "Every person convicted of murder in the first degree shall be punished with death, except when the trial jury in its verdict recommends life imprisonment, in which case the penalty shall be life imprisonment."

With respect to the alleged promises of recommending an early parole, not only did appellant fail to mention this as a factor on his direct and cross-examination, but also former District Attorney Donald Heisler himself denied promising appellant he would recommend an early parole if appellant would waive indictment and plead guilty to second degree murder (Tr 127, 129-130). In fact there was no need to make such a promise since appellant according to Heisler was "cooperative throughout and generally friendly" (Tr 127).

Similarly both Heisler and Yakima County Prosecuting Attorney Don J. Clark denied having had any conversation concerning a parole for appellant (Tr 127, 87).

Appellant argues (App Br 27-28) that Heisler's denials were insufficient to contradict appellant's testimony because Heisler merely testified "No, sir. I do not recall that" or "No, I don't recall having any conversation about a parole with Mr. Clark for

Knowles" (Tr 127).

This form of testifying is permissible particularly after a lapse of more than 11 years is involved. Covey v. State, 232 Ark 79, 334 SW2d 648, 651 (1960):

> "Of course, a witness cannot state his impressions, conclusions, inferences, suppositions or understanding of a matter unless such answer is equivalent to a statement of the fact asked for, but witnesses are not required to give their testimony with absolute positiveness. A witness who is not positive may make a statement of a fact to the best of his recollection or belief and his testimony should not be excluded because he uses 'it is my impression,' 'I think', or a similar expression where he means that he is testifying to the best of his recollection or an indistinct remembrance of facts within his personal knowledge. 98 C.J.S. Witnesses § 355, p. 79. * * *" (Emphasis supplied)

Furthermore the lower court was not required to unqualifiedly accept the testimony of an admitted criminal (Tr 61-63) who had attempted to hide from the police the facts concerning his latest crimes (Tr 66-68).

The credibility of appellant and the other witnesses was for the trial court. Rule 52 (a), Federal Rules of Civil Procedure. (A-51). Hagan v. Goldberg, 291 F2d 249, 251 (9th Cir 1961):

> "It is for the trial court to pass on the credibility of witnesses. Where the finding involves the credibility of witnesses, if supported by substantial evidence, it is conclusive on appeal. Bloom v. United States, 9th Cir., 1959, 272 F.2d 215, 223."

See also Brooks v. School District of City of Moberly, Missouri, 267 F2d 733, 739-740 (8th Cir 1959) where the Eighth Circuit stated a trial court was not compelled to believe even

uncontradicted testimony.

Appellant argues (App Br 28-29) that former District Attorney Heisler had the "strongest motive" to make promises to appellant in order to get appellant to waive statutory procedures because the State of Oregon was given custody for only ten days (R 27, par 33, R 61, par XXII; Ex 3, p 7) at least three of which were spent in traveling between Sacramento, California and The Dalles, Oregon (Tr 131-132).

This facet of appellant's argument is ludicrous if not ridiculous.

In the first place what Mr. Heisler's motives and mental processes were is pure conjecture and the trial court was not required to disbelieve Mr. Heisler's testimony on the basis of such conjecture.

Secondly, the justice court had no statutory authority to adjudicate appellant's guilt of second degree murder, a felony, former ORS 51.040, 51.050 and 161.030 (1) (1953 Replaced Parts) (A-51 to A-53) and in 1954 no statutory authority to appoint counsel at state expense, former ORS 133.610, 133.620 and 133.-630 (1957 Replaced Parts) (A-52).

Thirdly, not only was the circuit judge a magistrate, ORS 133.030 (2) (A-52), but by going to that court Heisler went to the only court with felony jurisdiction, Jensen v. Gladden, 231 Or 141, 144, 372 P2d 183 (1962), and the only court then with the express authority to appoint counsel: former ORS 135.310 and

135.320 (1957 Replaced Parts) which provided as follows:*

> "If the defendant appears for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned and shall be asked if he desires the aid of counsel." ORS 135.310.

> "Whenever it appears upon arraignment of a person accused in the circuit court of a crime against the laws of this state that he is without funds and unable to retain his own counsel, the court having jurisdiction of the cause shall, upon request of the accused, appoint suitable counsel, not exceeding two, to represent him." ORS 135.320.

Fourthly, by going directly to the circuit court on Wednesday, the day after appellant arrived in Oregon (R 27, par 34, R 61, par XXII; Tr 126, 127, 129, 130) the district attorney was able to have experienced counsel immediately appointed for appellant (Ex 2, pp 3-4, A-20). Such counsel was certainly in a position to insist on a preliminary hearing as the price of holding appellant in custody further and on an indictment if he had so desired.**

Finally, the unlikelihood of a deal between the district attorney and appellant is not only belied by appellant's own

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* Technically the statutes provided for appointment of counsel only upon arraignment where there was a charge pending in the circuit court. Although no such charge was pending in the Circuit Court of Wasco County at the time appellant first appeared in circuit court the appointment of counsel as was done apparently was a customary practice. See date on information, exhibit 1.

** Heisler testified that the time for Oregon's temporary custody of appellant could have been extended or appellant returned from the federal authorities for trial at a later date (Tr 132).

testimony on direct and cross-examination (supra, pp 12-13) but also appellant's failure even to tell his counsel of any such significant event. (Tr 49-50).

For the foregoing reasons the court had ample evidence from which to find appellant's plea was not the result of any promise to recommend an early parole but rather was voluntarily entered because of the advice of competent counsel.

POINT AND AUTHORITIES NO. 2

Appellant by his voluntary plea of guilty to the charge of second degree murder on the advice of competent counsel waived all nonjurisdictional defects in prior proceedings or defenses he may have had including the purported defense that his prior statements of guilt were involuntary and inadmissible.

Thomas v. United States, 290 F2d 696, 697 (9th Cir 1961)

Snipe v. United States, 343 F2d 25, 28 (9th Cir 1965), cert den 382 US 960, 15 L ed2d 363

Wallace v. Heinze, 351 F2d 39, 40 (9th Cir 1965)

Busby v. Holman, 356 F2d 75, 77-80 (5th Cir 1966)

Waley v. Johnston, 139 F2d 117, 121 (9th Cir 1943), cert den 321 US 779, 88 L ed 1072, reh den 321 US 804, 88 L ed 1090

United States v. Gilligan, 363 F2d 961 (2d Cir 1966)

United States ex rel Cuevas v. Rundle (ED of Pa 1966)

Brookhart v. Janis, 382 US 810, 16 L ed2d 314 (1966)

Wilson v. Rose, (9th Cir, Sept. 12, 1966)

Schwensow v. Burke, 252 F Supp 336, 338-339 (ED Wis 1966)

Stein v. New York, 346 US 156, 186, 97 L ed 1522, 1543 (1953)

Jackson v. Denno, 378 US 368, 391, 12 L ed2d 908, 924 (1964)

ARGUMENT

Appellant goes to great length at pp 29-45 of his brief to demonstrate that appellant's confessions were involuntary and therefore tainted his guilty plea and made it involuntary.

We have already pointed out, pp 11-20, supra, that the trial court properly found that appellant's plea was entered voluntarily on the advice of competent counsel and because of the possibility of a first degree murder charge if a plea of not guilty was entered.

In such context the question of whether the circumstances under which the prior statements of appellant were obtained rendered one or more of those prior statements inadmissible is foreclosed and irrelevant.

For, as this court in Thomas v. United States, 290 F2d 696, 697 (9th Cir 1961) said:

> "The trial court's action in denying the motion [by a convicted defendant to vacate a sentence on the ground his indictment was based on illegally seized evidence] was not erroneous. By his plea of guilty appellant foreclosed his right to raise objections to the manner in which evidence upon which he was indicted was obtained. This evidence, because of his guilty plea, was not used against him. Had he stood trial his

objection to its introduction, if made and overruled by the trial court, could have been raised on appeal. Under the circumstances he may not belatedly raise the contention under 28 U.S.C. § 2255. * * * When a defendant voluntarily and knowingly pleads guilty at his trial this constitutes a waiver of all nonjurisdictional defenses, including the defenses raised by this motion. * * * [citing authorities] The conviction and sentence which follow a plea of guilty are based solely and entirely upon said plea and not upon any evidence which may have been improperly acquired by the prosecuting authorities. * * * [citing authorities]" (Emphasis supplied)

To the same effect are Snipe v. United States, 343 F2d 25, 28 (9th Cir 1965), (footnote 5 [Escobedo type claims]), cert den 382 US 960, 15 L ed2d 363, and Wallace v. Heinze, 351 F2d 39, 40 (9th Cir 1965), (evidence illegally acquired), and Busby v. Holman, 356 F2d 75, 77-78 (5th Cir 1966), (coerced confessions).

Appellant argues, however, (App Br 45) that since appellant's counsel, Van Vactor, advised appellant to plead guilty "in ignorance of the facts establishing the involuntariness of the confessions" appellant's plea itself was consequently involuntary.

Before answering this contention directly several comments are appropriate.

First, this is not a case where the pleadings have raised any claim that appointed counsel was incompetent. The pleadings make no such claim. See pp 1-2, supra.

Secondly this is not a case where the pleading claims or the evidence proves that counsel had an insufficient time to consult with his client.

In fact, Van Vactor testified to the contrary (Tr 76):

"Q How many times did you confer with Mr. Knowels?

A It was more than once, but I could not say definitely how many times.

Q Did you feel you had adequate time to investigate the case?

A Under the circumstances of that situation, my conscience was satisfied when I finished.

Q You were not satisfied?

A My conscience was satisfied as an attorney. I felt that I was in possession of sufficient facts.

Q If you had needed more time you could have requested the Court for more time?

A I would have asked for it." (Emphasis supplied)

Nor, thirdly, are we dealing with a young and inexperienced attorney. To the contrary Mr. Van Vactor had been a member of the Oregon Bar for 22 years at the time of his appointment to represent appellant. (Tr 69).

Turning now to the facts, the evidence concerning the confessions is that appellant did not explain to his counsel "any of the circumstances or details of the questioning which led to those statements." (Tr 72).

This evidence is equivocal, however.

The quoted evidence does not establish that Mr. Van Vactor did not advise appellant that if his statements to the police were involuntary or coerced they would be inadmissible.

The quoted evidence does not establish that appellant did not advise Van Vactor that the police were gentlemen (Tr 58) and treated him very nice (Tr 64) or that appellant gave his confessions voluntarily because he wanted to get the matter "off

my chest and mind" (Ex 6, p 15; footnote A-15). From the cited references the court could have concluded that appellant had so advised Van Vactor.

In short there is no evidence definitely establishing what inquiry Van Vactor made of appellant with respect to the confessions nor what response appellant made with respect thereto.*

The evidence does establish however that on the basis of the information Van Vactor was able to obtain, he concluded that the confessions were admissible and so advised appellant (Tr 50, 72).

It may be presumed that the normal attorney-client relationship existed between Van Vactor and appellant and that Van Vactor advised appellant that if the confessions were the result of coercion they would be inadmissible. Waley v. Johnston, 139 F2d 117, 121 (9th Cir 1943), cert den 321 US 779, 88 L ed 1072, reh den 321 US 804, 88 L ed 1090.

And even if it be assumed that appointed counsel's decision that one or more of the prior confessions were admissible was erroneous or was made with insufficient information, this fact alone does not raise a federal question. Busby v. Holman, 356 F2d 75 (5th Cir 1966).

In the cited case, the appellant contended in part (356 F2d 78-79):

> " * * * <u>that his plea of guilty was influenced by his knowledge of the fact that he had made a confession which he assumed could be used against him</u> at the trial, and

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* See lines 16 to 22, p 49, transcript.

that his decision to plead guilty was, in reality, involuntary because he did not know when he made it that his confession could not have been so used because it was obtained by coercion and without his having been given an opportunity to consult counsel. * * *"
(Emphasis supplied)

The state answered that contention in that case by pointing out (356 F2d 79):

" * * * that the appellant had the advice of competent counsel in making his plea of guilty and cannot, therefore, now be heard to impugn his own act done under such advice."

Responding to these contentions the fifth court stated (356 F2d 79):

"In considering this contention of the appellant we must bear in mind that the constitutional requirement of effective assistance of counsel does not require or permit the court upon a subsequent review to analyze counsel's mental processes in order to determine whether every conceivable avenue of evidence has been totally explored and every possible theory of defense has been pursued. United States ex rel. Boucher v. Reincke, 2 Cir. 1965, 341 F.2d 977, 981. It is not counsel who is on trial. There can be held to be a lack of the effective assistance of counsel only when it appears that counsel's assistance was so grossly inept as to shock the conscience of the court and make the proceedings a farce and a mockery of justice. * * * [citing and quoting authorities]"
(Emphasis supplied)

Continuing on the court said (356 F2d 80):

" * * * Here the district court has found on ample evidence that the appellant's confession was voluntary and there has been no suggestion by the appellant that he did not truthfully state the facts in it. We cannot assume that counsel did not take these circumstances into account as well as the state of the law as it then was on the right to counsel during interrogation in determining whether to advise his client to plead guilty. Doubtless in giving that advice counsel took into account the fact which was known to him that the appellant's confession was corroborated by a statement by the prosecutrix, factually almost identical, which was in the possession of the circuit solicitior. The fact that if convicted the appellant faced the electric chair was another factor which must have been considered by counsel in advising the appellant to accede to the arrangement with the circuit solicitor by which on a plea of guilty he would escape the possibility of execution." (Emphasis supplied)

Concluding on this point the court said (356 F2d 80):

"However, as we have pointed out, the district court was not called upon to try the merits of the advice given by counsel to the appellant but merely to determine that counsel was not so completely inept and incompetent as to render the proceedings a farce. The district court found that the appellant was afforded the assistance of competent counsel. We are satisfied that the record amply supports that finding. Indeed the fact that the appellant is alive today may well be a testimonial to it. It follows that there is no merit in appellant's contention that his plea of guilty was not voluntarily and understandingly made because he was not properly advised by his counsel

with regard to his confession."* (Emphasis supplied)

See also Schwensow v. Burke, 252 F Supp 336, 338-339 (ED Wis 1966).

In accordance with the foregoing authorities we deem it neither necessary nor appropriate to argue the merits of Mr. Van Vactor's advice to appellant to plead guilty to a charge of second degree murder, because only Mr. Van Vactor had the awesome responsibility of determining the life or death fate of appellant, and because only Mr. Van Vactor was in a position to ascertain from his discussions with the district attorney and with appellant and from whatever other investigation he made at that time what chance the state had of proving a first degree murder charge against appellant.

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* In United States v. Gilligan, 363 F2d 961 (2d Cir 1966), the court overturned a conviction on a plea of guilty entered on the advice of counsel. However the plea in that case had been made by a 13 year old boy with a history of epilepsy and brain abnormalities and the record didn't indicate that the boy had made a reasoned choice.

United States ex rel Cuevas v. Rundle, (ED of Pa, decided September 19, 1966) holds that a plea of guilty may be challenged where the plea was made only because "able counsel" thought a coerced statement to be admissible. The case does not appear to us to be sound since in effect it holds counsel's advice must be correct. In reaching that result the court relied on Brookhart v. Janis, 382 US 810, 16 L ed2d 314 (1966), which is not in point since that case involved a defendant who advised the court he wasn't pleading guilty but the court and defendant's counsel went ahead as if he had plead guilty.

Appellant's other authorities on this point also appear to be unsound to the extent that they, with the benefit of hindsight, require correct advice rather than merely competent counsel. Wilson v. Rose, (9th Cir, Sept. 12, 1966), of course, involves grossly inept or incompetent counsel.

In exercising that responsibility Mr. Van Vactor rightly or wrongly determined that one or more of the confessions were admissible and rightly or wrongly determined that the state could prove a first degree murder case against appellant.*

Accordingly Mr. Van Vactor advised appellant as to "what was involved and the various hazards" (Tr 71) and of "the serious nature of the situation at that time" (Tr 70), and as a consequence appellant plead guilty to second degree murder. (Tr 50, 51, 57-58).

Absent an allegation of incompetence of counsel (and there is none) and proof of incompetence or gross ineptitude (and there is none) this should foreclose any further inquiry into the admissibility of the confessions.

Accordingly we deem it unnecessary to argue with appellant the point whether one or more of the confessions would have been admissible if appellant had plead not guilty and gone to trial.

However, in the event that the court may wish to consider this facet of the case further, we will briefly list the factors supportive of the voluntariness of the confessions given to the CII, which confessions were apparently the ones that influenced Van Vactor in his advice to appellant (Tr 51):

1. At each of three interviews between the FBI and appellant which dealt with Stuart, the deceased, as well as the stolen vehicle, appellant was advised that any statement he made could be used against him, that he was not required to make a

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* Actually the record doesn't show just what appellant told Van Vactor. The story appellant told Van Vactor may have convinced him that it would be both futile and dangerous to contest the state's case.

tatement, and that he had the right to consult an attorney. The interviews occurred on October 11, October 20 and October 29, 954. (Tr 138-145; Ex 14).

2. On November 18, 1954, appellant appeared in court in acramento on the Dyer Act charge arising out of his theft of tuart's vehicle and was advised of his right to counsel by the ourt in connection with that charge (Ex 3, pp 2-3).

If appellant was as ignorant of legal matters as he claims, hen it is doubtful that he distinguished between the right to ounsel in court and right to counsel by interrogation.

3. With respect to the CII investigators who commenced uestioning appellant on November 18, after appellant's court ppearance (R 22, par 10-11, R 58, par VI; Tr 23), appellant des- ribed them as "gentlemen all the way through, every bit of the ay" (Tr 58). Appellant also thought "they was treating me very ice" (Tr 64).

4. The atmosphere in which the questioning by the CII ook place was cordial and appellant at no time evidenced any eluctance to talk (Tr 105). Between investigators and appellant here "was a very pleasant exchange of conversation and words" Tr 20).

5. None of the interrogations of appellant lasted over hree or four hours (Tr 18) with only one man as the primary nterrogator (Tr 14). It was not a question and answer situation ll the way through (Tr 105).

6. Appellant was told by CII Investigator Coffey that ppellant was privileged not to talk if appellant was so

inclined (Tr 101-102, 114-115) and Coffey also advised appellant that anything appellant told him Coffey was "obligated to pass along to the people who have responsbility for handling this investigation" (Tr 102).

7. There was no evidence of grueling relay questioning nor of lack of sufficient rest or refreshment.

8. The polygraph test was explained to appellant (Tr 103) and appellant was given the choice of whether or not to take the polygraph examination (Tr 106). The interrogator again told appellant that he was free not to talk if he felt so inclined. (Tr 112).

9. Appellant was told some of his answers to the polygraph examination were false (Tr 116-117).

10. There was no admission of guilt until the day following the polygraph examination on November 20, 1954 (Tr 25-26)*.

11. The questioning subsequent to November 20 was to fix the location of the body (Tr 105).

12. Appearance by appellant in Federal District Court again on November 23, 1954 (Ex 3, p 5). If appellant had been any way mistreated he could certainly have appealed to that court.

13. Admission by appellant to CII Investigator Coffey in absence of Prosecutor Don J. Clark (Ex 6, p 2) on afternoon

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* In Stein v. New York, 346 US 156, 186, 97 L ed 1522, 1543 (1953), (overruled on other grounds in Jackson v. Denno, 378 US 368, 391, 12 L ed2d 908, 924 (1964)) the court pointed out that no confession to the police after interrogation is "voluntary" in the sense that the confessor wants to admit guilt or in the sense that it is spontaneous as in a confession to a priest. The court in that case also pointed out that the confessions came after the suspects were convinced "that their dance was over and the time had come to pay the fiddler." 346 US at 186, 97 L ed at 1543.

of Decmeber 1, 1954 that no promises or threats, rough treatment or duress of any sort had been used on appellant to obtain his confessions (Ex 6, p 1). See also pp A-42 to A-43 of Appendix.

14. Admission by appellant at same questioning that he knew that his statement could be used against him at the trial but that he wanted to get his guilt "off my chest and mind" (Ex 6, p 15, footnote A-15).

VI

CONCLUSION

We submit that the evidence is clear that appellant's plea of guilty was a voluntary choice made after consultation with competent counsel and, therefore, the judgment of the lower court should be affirmed.

Respectfully submitted,

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Attorneys for Appellee

Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PETER S. HERMAN
Assistant Attorney General

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

---oOo---

HARRY C. KNOWLES, Petitioner,	)	Civil No. 64-121
vs.	)	
CLARENCE T. GLADDEN, Warden, Oregon State Penitentiary, Defendant.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This is an application for release of Harry C. Knowles from the Oregon State Penitentiary on a writ of habeas corpus.

FINDINGS OF FACT

On October 18, 1954, Harry Knowles was arrested by agents of the United States and taken before a United States Commissioner in Tallahassee, Florida, for preliminary hearing on an information charging him with the interstate transportation of a stolen 1950 Chevrolet pickup truck which had belonged to one Albert Calvin Stuart. He was forty-six years old at the time but was unable to read or write well, having attended elementary school only through the fourth or fifth grade.

Prior to his arrest by federal authorities, Knowles had been incarcerated in the County Jail at Apalachicola, Florida, and on October 11, 1954, was interviewed there by Charles L. Carroll, a special agent of the Federal Bureau of Investigation. Carroll questioned Knowles with respect to the federal motor

ehicle theft charge for three quarters of an hour or one hour, ut Knowles denied knowing anything about the Chevrolet pickup r Stuart's whereabouts.

Carroll advised Knowles that any statement he made could e used against him, that he was not obliged to make any state- ents, and that he had the right to consult an attorney. Knowles estified he was first told that he might have assistance of ounsel in connection with the federal charge when he appeared efore the United States Commissioner, but that the Commissioner aid " * * * It doesn't make any difference whether you have got n attorney or not, they are going to take you back to California."

On October 20, 1954, agent Carroll interviewed Knowles second time at the Federal Correctional Institution in Talla- assee. The interrogation lasted one and a half or two hours. t the trial, Carroll produced a statement prepared in his hand- riting, dated October 20, 1954, which was signed by Knowles. he statement related solely to the motor vehicle theft charge nd contained recitals to the effect that Knowles had been advised f his right to consult an attorney and of the fact that the tatement could be used against him.

Agent Carroll interviewed Knowles a third time, on ctober 29, 1954, for a period of about two hours, and he repeated he advice he had given Knowles during the previous interviews.

Knowles remained in federal custody in Florida throughout ctober and the first half of November, 1954. Meanwhile, however, had become the prime suspect in a probable homicide involving he owner of the vehicle he was charged with having stolen. The alifornia Bureau of Criminal Identification and Investigation

CII) had undertaken the investigation of the suspected homicide nd made preparations to interrogate Knowles upon his arrival in alifornia.

In an effort to obtain incriminating statements from nowles, Investigator Charles E. Casey, of the CII, contacted he chief jailor of the Sacramento County Jail on November 11, 954, and with his cooperation, installed a microphone in a cell n the fifth floor of the Jail and a recording unit in the attic f the building. No useful information was obtained from the evice.

On November 12, 1954, Knowles was indicted by a federal rand jury, sitting in Sacramento, California, for violation of he National Motor Vehicle Theft Act, and on November 15, 1954, as transported to Sacramento by train, arriving there at four 'clock p.m. on Wednesday, November 17, 1954.

At 9:30 o'clock a.m. on Thursday, November 18, 1954, nowles appeared in the United States District Court in Sacramento or arraignment on the indictment. He was advised by the Court nat he was entitled to an attorney to assist in the defense of ne federal charge, but he declined counsel and entered a plea of uilty, which the Court accepted.

Later that same morning, at approximately eleven o'clock m., Knowles was taken to the office of the United States Marshal n Sacramento and interrogated there by Investigators Charles E. sey and A. L. Coffey of the CII about his responsibility for e disappearance and probable death of Stuart. Knowles was inter- gated until 4:30 o'clock p.m. but made no incriminating state- nts.

The object of the interrogation on November 18 was to prepare Knowles for a polygraph (lie detector) test, and for that reason, Investigator Coffey, who was not earlier connected with the investigation, played the principal role in the interrogation.

Coffey had been connected with law enforcement agencies for twenty-three years (since 1931), and had acquired expertise as a polygraph specialist through practical experience and university training. His education in these matters extended over his entire career in law enforcement and he had taken university courses in subjects relevant to the interrogator's art, such as psychology and physiology.

To secure Knowles' consent to the test, and to obtain his confidence and prepare him emotionally in order to insure useful results, Coffey undertook to develop a rapport with Knowles. He testified that an air of antagonism would have limited the effectiveness of the examination and that the development of a cordial, friendly atmosphere was prescribed procedure in preparing for a polygraph test. Coffey's prime objective was to create a pleasant atmosphere because such a relationship is more conducive to a meaningful test which may readily be interpreted.

To help achieve the necessary rapport and to obtain Knowles' consent to the test, Coffey manifested an attitude of apparent neutrality so far as the conduct of the examination was concerned. He represented to Knowles that he was there to establish the true facts and was as eager to develop facts beneficial to Knowles as facts detrimental to him. He told Knowles: " **** that I am a completely neutral participant in this thing; my only function is to establish as nearly as possible the true facts of

ne situation * * *." Knowles was not advised of his right to onsult with counsel nor told that his statements could be used gainst him in Court. Coffey stated: " * * * I am here in an fficial capacity, and anything that I get, anything that you rovide me, I am obligated to pass along to the people who have esponsibility for handling this investigation."

On Friday, November 19, 1954, Knowles was again taken o the office of the United States Marshal in Sacramento and nterrogated by CII Investigators Coffey and Casey from 11:15 a.m. ntil 4:30 p.m. During the course of the interrogation, Investi- ator Coffey, administered a polygraph test to Knowles lasting bout one and a half hours, during which Knowles was questioned xtensively about his responsibility for the death of Stuart. lthough Knowles did not incriminate himself during this interro- ation, when the polygraph test was completed Coffey told him that ome of his answers were false.

While administering the polygraph test, it was necessary o establish a "normal" response by asking Knowles a number of rrelevant questions and occasionally interjecting a question ertinent to the investigation. The admitted object of this rocedure was to cause Knowles to relax so that his reaction to mportant questions would be more readily apparent to the investi- tor than otherwise.

The advice given Knowles regarding his rights on November , if any, was no different from that given the previous day.

Knowles was interrogated again on Saturday, November 20, 54, in the Sacramento County Jail by Investigators Coffey and sey for two or three hours beginning at 9:30 a.m. As a result

of the interrogations, Knowles finally orally admitted killing Stuart. Coffey told Knowles that if he cooperated, "it would be a lot easier for me if I did." Knowles was given no advice on November 20 regarding his right to remain silent and his right to counsel.

At 9:30 o'clock a.m. on the morning of Monday, November 22, 1954, Knowles was taken before the United States District Court in Sacramento to be sentenced on his conviction for violation of the Dyer Act, but sentencing was postponed until December 14, 1954. This postponement was arranged for the express purpose of permitting the CII investigators additional time to interrogate Knowles.

Knowles was again interrogated on November 22, beginning at 11:30 a.m., by Investigators Coffey and Casey, in the United States Marshal's office. He was still being interrogated at 1:30 p.m. that afternoon. Knowles was not told of his right to remain silent or of his right to counsel during this interrogation.

The CII investigators arranged with the federal probation officer for further postponements of Knowles' sentencing should it become necessary to engage in additional interrogations. The CII report states: "On November 24, 1954, Investigator Casey contacted George S. Ford, Jr. U.S. Probation and Parole Officer, Federal Building, Sacramento. Mr. Ford was interested in knowing about Knowles and in his activities prior to the time of his arrest on federal charges, Mr. Ford was extremely cooperative and guaranteed this investigator that if additional time was needed for questioning the subject, he believed this time could be granted by arranging same with the federal judge."

Knowles was again interrogated by the CII investigators on Tuesday, November 30, 1954, in the United States Marshal's office. To the best of Knowles' recollection, he was questioned from approximately 8 a.m. to 11:30 a.m., and from 1 p.m. until 3:30 or 4 p.m. Don J. Clark, the Prosecuting Attorney of Yakima County, Washington, was present during this interrogation because Knowles believed the death of Stuart had occurred in Yakima, Washington. Clark stated that he did not give Knowles any cautionary instructions during the interrogation.

On Wednesday, December 1, 1954, beginning not later than 10:25 a.m., Knowles was interrogated in the office of the United States Marshal in Sacramento by Prosecuting Attorney Clark and Deputy Sheriff Dell Young of Yakima County, Washington, and by Investigator Casey of the CII, in an attempt to obtain from Knowles a written statement admitting that he had caused the death of Stuart in Yakima, Washington. Clark did not make any promises or threats to Knowles.

Knowles agreed to give Clark a written confession, and Clark then prepared a statement in his own handwriting which Knowles signed. Clark prepared the statement for use in a subsequent prosecution.

Clark corrected a number of mistakes in the statement which he had made intentionally, and then had Knowles initial the corrections in accordance with a common police procedure for establishing that a witness has read a statement. Since Knowles was unable to read, he placed his initials on the statement according to Clark's instructions. Clark had told Knowles he did not have to talk, and that any statement he made could be used

against him.

During the afternoon of Wednesday, December 1, 1954, Knowles was further interrogated by Investigator Coffey of the CII between the hours of 2 p.m. and 3:02 p.m. in the presence of Prosecuting Attorney Clark, Deputy Sheriff Young, and CII Investigator Casey.

On Thursday, December 2, 1954, at the request of the CII and officials of Yakima County, Washington, Sergeant Charles U'Ren of the Oregon State Police filed a petition for a writ of habeas corpus ad prosequendum in the Circuit Court of Oregon for Hood River County, seeking Knowles' release from federal custody ostensibly for the purpose of prosecuting him on a larceny complaint filed in Hood River Justice Court on September 30, 1954. The Circuit Court granted the petition and issued the writ.

On Friday, December 10, 1954, the United States District Court in Sacramento entered an order releasing Knowles into the custody of the Sheriff of Hood River County, and Knowles was then transported into Oregon by automobile, arriving in Klamath Falls on Friday, December 10, 1954. During the trip into Oregon, Knowles was accompanied by CII Investigator Casey, Sergeant U'Ren and Sheriff Gillmouthe of Hood River County, who questioned him about the location of Stuart's body and the details of his trip into Oregon with Stuart in 1953. He was given no advice regarding his rights during questioning.

On Sunday, December 12, 1954, Stuart's body was located and exhumed at Shaniko, Oregon. Knowles was interrogated further at the site by Lt. Tucker of the Oregon State Police, Prosecuting Attorney Clark and CII Investigator Casey, and as a result of

the interrogation, admitted killing Stuart at Shaniko, Oregon. Knowles was not advised of his right to counsel or of his right to remain silent during the interrogation.

At approximately 3:30 p.m. on Sunday, December 12, 1954, Knowles was returned to Oregon State Police Headquarters at The Dalles, Oregon, and Prosecuting Attorney Clark introduced him to District Attorney Donald Heisler of Wasco County, Oregon. Clark told Heisler, " * * * This fellow has been very cooperative with us all the way along the line."

During the evening of Sunday, December 12, 1954, starting at approximately 7:45 p.m., Knowles was interrogated further at Oregon State Police Headquarters in the presence of Sergeant U'Ren, Lt. J. Eric Tucker and Captain Gurdane, all of the Oregon State Police, and Ernest Mosier, Sheriff of Wasco County, Investigator Casey of the CII, Donald E. Heisler, District Attorney for Wasco County and M. D. Van Valkenburgh, Deputy District Attorney of Wasco County. During the interrogation, District Attorney Heisler prepared a typewritten statement in narrative form which Knowles signed. A number of typographical errors were corrected and the officials had Knowles initial the corrections. Knowles acknowledged in the statement that the statement was given voluntarily and without fear, threats or promise of reward, and after having been told that the statement could be used against him.

Although Knowles' temporary release from federal custody was accomplished by means of a writ of habeas corpus obtained for the alleged purpose of prosecuting him in Hood River County for larceny, at no time while he was in the custody of the Oregon

authorities was he taken before the Justice Court of Hood River, or any other magistrate, for arraignment and preliminary hearing on the larceny complaint filed in the Justice Court.

On Monday, December 13, 1954, Knowles was returned by automobile to the custody of the United States Marshal in Sacramento, California.

On Tuesday, December 14, 1954, Knowles again appeared before the United States District Court in Sacramento, but sentencing was further postponed at the request of the probation officer.

On Wednesday, December 15, 1954, the Sheriff of Wasco County, Oregon, filed an information in the Justice Court of The Dalles charging Knowles with murder in the second degree, and a warrant for Knowles' arrest was issued by that Court. On Friday, December 17, 1954, a petition for a writ of habeas corpus ad prosequendum was filed in the Circuit Court of Wasco County to obtain the release of Knowles from federal custody, and a writ was issued the same day.

On Monday, December 20, 1954, Knowles appeared before the United States District Judge in Sacramento who honored the writ of habeas corpus and ordered that Knowles be released in the custody of the Oregon authorities on condition that he be returned to federal custody in Sacramento on or before December 30, 1954, ten days later. Sheriff Mosier of Wasco County and District Attorney Heisler transported Knowles to The Dalles by automobile, arriving there during the afternoon of Tuesday, December 21, 1954. During the trip, Knowles was questioned about his travels with Stuart but he was not advised of his

ight to remain silent or of his right to assistance of counsel.

On Wednesday morning, December 22, 1954, after arranging o have the case heard that morning by the Circuit Court of Wasco ounty, Heisler visited Knowles in the Wasco County Jail. Heisler ad a conversation with Knowles on the morning of December 22, 954, but he did not represent that if Knowles would waive indict- ent and plead guilty to an information charging second degree urder, he (Heisler) would recomend an early parole. At the onclusion of this conversation, Knowles was taken directly before he Circuit Court of Wasco County even though he had not been rraigned in Justice Court on the information filed there, given n opportunity for a preliminary hearing, or indicted by the rand jury. This procedure presupposed that Knowles would waive reliminary hearing and indictment.

When Knowles appeared in Court that morning, he sought o waive counsel and plead guilty, but the Court declined to ermit him to do so and appointed Sam Van Vactor, an attorney racticing in The Dalles, Oregon, to represent him.

After his appointment, Van Vactor conferred with Knowles. e obtained Knowles' story and discussed the case with the District ttorney. Knowles told Van Vactor of his prior confessions but id not explain the details or the circumstances which led to them. or did he mention his conversations with Hesiler. Van Vactor's ecollection was that he was not shown the written statements ich had been obtained from Knowles.

Van Vactor thought, however, that if the case were pre- nted to the grand jury, Knowles would be indicted for first gree murder, and he believed that the confessions would be a

"major factor" in a trial. He advised Knowles of this fear and of his evaluation of the case. As a result of this advice, Knowles waived indictment and pleaded guilty to an information charging him with second degree murder on December 24, 1954. He was sentenced to life imprisonment on December 29, 1954.

O P I N I O N

The Court's conclusions of law are contained in the following brief opinion, and if facts are stated, the Court finds them to be true.

While the uniform excellence of the work of George L. Kirklin, Court appointed attorney for Petitioner in this case, would require granting the relief sought if this were a contest between counsel, the Court cannot, in good conscience, order the release of an admitted murderer whose case was properly investigated in accordance with Constitutional standards applicable in 1954. The rules of Escobedo and Miranda are not retroactive.

Petitioner voluntarily and with full understanding of the consequences pleaded guilty to the offense of second degree murder. No law enforcement officer abused or mistreated Petitioner in any way during interrogation. No false statements or representations were made to Petitioner to persuade him to confess. He was not promised a recommendation for early parole. The totality of circumstances does not show that his will to remain silent was overborne by coercion tactics. On the contrary, after voluntarily submitting to a polygraph examination, his decision to confess was prompted primarily by his conscious-

ness of guilt,[1/] fortified by knowledge that his fingerprints had been found on the deceased's vehicle and that he had "flunked" the lie detector test.

Similarly, the decision to plead guilty to an information charging second degree murder was reached voluntarily after consideration of the advice of competent counsel, Mr. Sam Van Vactor. It was not the product of a promise of recommendation for early parole, as no such promise was made. Admittedly, it was influenced by the possibility of being exposed to an indictment charge of first degree murder. While the circumstances of the homicide as related in the confessions, which we presume are the same facts told Van Vactor by Knowles, leave open for consideration the degree of criminal homicide of which Knowles might have been convicted, it is not the province of a Court to second-guess the judgment of a local attorney. One reason local attorneys are appointed or retained to represent defendants is that they have knowledge of the attitudes of the people who comprise the grand and petit juries and are better able to form

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1/ In his stenographically reported statement to CII investigators, Knowles said:

"Q-- Again I would like to repeat, has anybody offered you anything in the way of promises or used any threats or violence or anything of that sort to induce you to make this statement?

"A-- Absolutely no. No.

"Q-- And you make this statement knowing that it is possible that anything you say in there may be used during the course of trial?

"A-- Yes. Well, I want to get it off my chest and mind, and now I can feel like a free man. It is impossible to know what it is to do anything like that."

judgment concerning the possibilities inhering in the case. We conclude that Knowle's (sic) decision to plead guilty to second degree murder was voluntarily and justifiably reached in prospect of the possibility of facing a charge of first degree murder in the trial of which his conduct in failing to notify authorities of the victim's death, his secret burial of the victim's body, his theft of the victim's property and his flight from the scene of the crime would be weighed against the credibility of the exculpatory portions of his confessions. We may, in considering habeas corpus twelve years after the event, reasonably speculate that evidence may have been available to refute the imputation in the confessions of homosexual characteristics of the victim, which, if produced, would have left Knowles entirely exposed to conviction for first degree murder.

J U D G M E N T

IT IS ORDERED, ADJUDGED AND DECREED that the petition for a writ of habeas corpus be, and it hereby is, denied.

Dated: June 23, 1966.

BRUCE R. THOMPSON
UNITED STATES DISTRICT JUDGE

EXHIBIT II

TRANSCRIPT OF WASCO COUNTY PROCEEDINGS

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR WASCO COUNTY

STATE OF OREGON, Plaintiff,	)	
vs.	)	No.
HARRY CECIL KNOWLES, Defendant.	)	

BE IT REMEMBERED That heretofore, to-wit, on the 22nd day of December, 1954, at the hour of 11:30 o'clock A.M., the above-entitled cause came regularly on for hearing before the Honorable M. W. Wilkinson, Judge of the above-entitled court, presiding:

APPEARANCES:

Mr. Donald E. Heisler, District Attorney, and
Mr. M. D. Van Valkenburgh, Assistant District Attorney;
in behalf of the State of Oregon;
Mr. Harry Cecil Knowles, in his own behalf.

(Thereupon the following proceedings were had, to-wit:)

MR. HEISLER: If the Court please; this is the time set for taking up the matter of the State of Oregon vs. Harry Cecil Knowles, who is in Court in the custody of the sheriff.

THE COURT: Now, Knowles, do you have an attorney?

MR. KNOWLES: No, sir.

THE COURT: Do you desire to have an attorney?

MR. KNOWLES: No, sir.

THE COURT: Well, under the law the Court may appoint an attorney for you if you're without funds and if you desire one. The thing is you're charged here in this Court with murder in the second degree, as I understand the matter, and of course that's a very serious crime and I feel personally that you should have legal advice on this matter to advise you of all of your legal rights as the different steps proceed. Now, I don't know what your background is particularly and whether you fully realize the import of having an attorney or not and the thing is an attorney would advise you step by step of the full procedure here and what your rights are, your legal rights guaranteed to you under our constitution and our judicial system and the statutes of the State of Oregon. For that reason I feel that you should have an attorney appointed to advise you as you go along on the matter. Do you have anything you desire to say in that respect?

MR. KNOWLES: No, sir.

THE COURT: You feel that you don't need one really yourself, is that it?

MR. KNOWLES: That's right.

THE COURT: How far did you go in school?

MR. KNOWLES: I had no education.

THE COURT: Well, you haven't had any real experience then with a serious charge, of course?

MR. KNOWLES: I have not.

THE COURT: Well, I think under these conditions you should be represented by counsel on the matter and I'm going to appoint Mr. Sam Van Vactor, one of our attorneys here in The Dalles to advise you on this matter before we go any further.

I want to know that your legal rights are fully protected. Mr. Van Vactor, you will take care of that before we go any further. I feel that this should be done on such a serious charge. That will be all then at this time and you confer with Mr. Van Vactor and report into the Court.

MR. KNOWLES: Well, Your Honor, could I say something, please?

THE COURT: Yes.

MR. KNOWLES: I can't understand why -- I can't see any sense of having an attorney. I've already committed the crime and admitted it and I'd kind of like to have this over with.

THE COURT: Well, it can move along as fast as you desire, but the only thing is, Knowles, that I want to be sure that you're fully advised of your legal rights and you can explain whatever you wish to your attorney, take that matter up with him, and it will proceed in an orderly way. Your attorney will look after advising you in that respect and I want to know that everything is proper. The Court is entitled to know that you are fully advised, you see, of every step that you take. If you want to plead guilty to the charge that's your business but you should be fully advised and have competent legal advice, particularly on a charge of murder in the second degree which is placed against you. Now, as to whether or not it would delay this matter or not, that's a thing for you and your attorney to discuss. I think that covers it. Mr. Van Vactor is here and he'll talk to you. That will be all then at this time.

MR. KNOWLES: Thank you.

(Thereupon the hearing was concluded.)

THEREAFTER, on the 24th day of December, 1954, at the hour of 10:15 o'clock A.M., the above-entitled cause came regularly on for hearing before the Honorable M. W. Wilkinson, Judge of the above-entitled court, presiding:

APPEARANCES:

Mr. Donald E. Heisler, District Attorney;
in behalf of the State of Oregon;
Mr. Sam Van Vactor, of Brown and Van Vactor;
in behalf of the defendant.

(Thereupon the following proceedings were had, to-wit:)

THE COURT: Now at this time the Court is ready to take up the matter of the State of Oregon v. Harry Cecil Knowles. You've had an opportunity to confer with your attorney?

MR. KNOWLES: Yes, sir.

THE COURT: And at this time are you ready to go ahead, Mr. Van Vactor?

MR. VAN VACTOR: Yes, Your Honor; we've gone over the matter thoroughly in the last couple of days and the defendant has not changed his mind as to the entry of his plea.

THE COURT: He's been fully advised then of his legal rights. By that, I mean, your right to have your case presented to the Grand Jury of this County if you so desire. On the other hand, you may come into Court and consent to the District Attorney filing an Information against you which charges you with the crime for which you are held. That procedure has all been

explained to you, has it, Mr. Knowles?

MR. KNOWLES: Yes; Your Honor.

THE COURT: Is it then your wish to waive presentment of this matter to the Grand Jury and consent to the District Attorney filing an Information against you? Is that your wish, or not?

MR. KNOWLES: That's right, sir.

THE COURT: We have a form of waiver of presentment of matters to the Grand Jury here that has been used here in the last year. Mr. Van Vactor, you can check it over and it covers these matters and if it's satisfactory why he may sign it.

(Thereupon the defendant read the waiver and signed the same.)

THE COURT: All right; I'll enter an order waiving presentment of this matter to the Grand Jury and you may proceed with the arraignment, Mr. Heisler.

MR. HEISLER: Your true name is Harry Cecil Knowles?

MR. KNOWLES: Yes.

MR. HEISLER: The information reads as follows: "In the Circuit Court of the State of Oregon for Wasco County - The State of Oregon, Plaintiff, vs. Harry Cecil Knowles, Defendant. Information for violation of O.R.S. 163.020. The above named defendant, Harry Cecil Knowles, having appeared before the Honorable M. W. Wilkinson, Judge of the above entitled Court, and waived indictment by Grand Jury, is accused in this Information by Donald E. Heisler, District Attorney of the State of Oregon for Wasco County, of the crime of MURDER IN THE SECOND DEGREE, committed as follows: That the said defendant, Harry Cecil Knowles, on the 21st day of September, 1953, in the County

of Wasco, State of Oregon then and there being, did then and there unlawfully and feloniously, purposely and maliciously kill one Albert Calvin Stuart by then and there choking and strangling the said Albert Calvin Stuart. Contrary to the statutes in such cases made, provided and against the peace and dignity of the State of Oregon. Dated at Dalles City, Oregon, this 24th day of December, 1954. Donald E. Heisler, District Attorney of the State of Oregon for Wasco County. Witnesses examined and available for prosecution: Sheriff Ernest Mosier, Sgt. Charles U'Ren, Dr. Homer H. Harris, James H. Mulvey, Sheriff R. L. Gillmouthe, Lt. J. Eric Tucker, Charles E. Casey, Harry Cecil Knowles, voluntarily making statement.

THE COURT: And you have delivered a copy to him. Well now, under the law, Knowles, you aren't required to enter your plea to the information which has just been read to you until after a day has passed unless you desire to waive that time and enter your plea at this time. You may consult with your attorney if you wish and let me know what your wish is in that respect. What is your wish as to waiving time for entering plea?

MR. KNOWLES: I don't get that, Your Honor.

THE COURT: Pardon?

MR. KNOWLES: I don't understand that.

THE COURT: What is your wish in respect to waiving time for entering your plea? Under the law I can't require you to enter your plea to the information or this charge which has just been read to you until after one day has passed unless you're willing to waive that time. If you want to go ahead now why you'll have to inform the Court as to whether or not you want to

and by that you would waive your time for entering your plea. If you do not waive the time we'll have to set the matter over, of course, until some subsequent time or a later time. Do you understand?

MR. KNOWLES: I see.

THE COURT: You can talk to Mr. Van Vactor about it.

MR. KNOWLES: I'll waive it and have it over with.

THE COURT: You want to waive time for entering plea?

MR. KNOWLES: Yes.

THE COURT: All right, let the record so show. What plea do you enter, guilty or not guilty?

MR. KNOWLES: Guilty, sir.

THE COURT: Your plea of guilty will be received. Now at this time under the law the Court cannot pass sentence until after two days has passed on a plea of guilty and there are some matters involved that I think it would be best to set the time for passing sentence over to Monday afternoon, that's this coming Monday, that will be December 27th. That's satisfactory to you, is it, Mr. Van Vactor?

MR. VAN VACTOR: That will be satisfactory, Your Honor.

THE COURT: We'll set the time for passing sentence then for two o'clock on Monday, December 27th. That will be all at this time.

(Thereupon the hearing was concluded.)

THEREAFTER on the 27th day of December, 1954, at the hour of 2:45 o'clock P.M., the above-entitled cause came regularly on

for hearing before the Honorable M. W. Wilkinson, Judge of the above-entitled Court, presiding:

APPEARANCES:

Mr. Donald E. Heisler, District Attorney;
in behalf of the State of Oregon;
Mr. Sam Van Vactor, of Brown and Van Vactor,
in behalf of the defendant.

MR. HEISLER: If the Court please, last Friday we left the matter with the Court and that the California authorities would be contacted, that is the Federal authorities in Sacramento, to see whether or not they would release their jurisdiction to the State of Oregon. We've had, as a result of the Christmas holiday in between, not sufficient time to work this out and I would like to request a day or so more time to see if we can work this matter out with them.

THE COURT: Do you have anything you wish to say, Mr. Van Vactor?

MR. VAN VACTOR: No; we're agreeable.

THE COURT: You're agreeable to continuing the time for passing sentence on this until this matter can be cleared with the Federal Court in California, the question of jurisdiction?

MR. VAN VACTOR: I have just talked to the defendant.

THE COURT: You understand, Mr. Knowles, there is a question of jurisdiction involved on this offense in California and we want to get, as I understand it, we're trying to clear this matter of jurisdiction so that we know where we are on it. A day or two may make some difference in getting the word back and finally getting it cleared up. I'll continue the matter of passing

sentence over and will not set a definite time here but I'll ask the District Attorney and counsel, Mr. Van Vactor, to attempt to get this matter cleared up in the course of the next day or two. At that time we'll notify you.

(Thereupon the hearing was concluded.)

THEREAFTER on the 29th day of December, 1954, at the hour of 10:45 o'clock A.M., the above-entitled cause came regularly on for hearing before the Honorable M. W. Wilkinson, Judge of the above-entitled Court, presiding:

APPEARANCES:

Mr. Donald E. Heisler, District Attorney, and
Mr. M. D. Van Valkenburgh, Assistant District Attorney,
in behalf of the State of Oregon;
Mr. Sam Van Vactor, of Brown and Van Vactor,
in behalf of the defendant.

THE COURT:

This is the time set for passing sentence on the matter of the State of Oregon vs. Harry Cecil Knowles and would you care to make a statement, Mr. Heisler before sentence is passed?

MR. HEISLER: Yes; I want to make a brief statement, Your Honor. The defendant has confessed that he committed this crime in Wasco County on September 21, 1953, in a trailer house which belonged to the deceased, Albert Calvin Stuart, and thereafter the body was buried where it was found south of Shaniko just off of the highway extending from the Cow Canyon road leading to Shaniko. Now, the defendant was born in 1907 and his occupation has been pretty much that of a fruit picker and various diversified occupations. He was born in Bangor, Maine and prior, on about September 19, 1953 he and the deceased left California for

the Yakima Valley and proceeded northward up U. S. Highway 99 to the scene of this crime. The defendant must be returned to the District Court of the United States for the Northern District of California, northern division, for sentencing on the Dyer Act, for violation of the Dyer Act. He's heretofore entered a plea of guilty under that charge but has been turned over to us by the California authorities and as I say, must be returned to them pursuant to the understanding by which he was turned over to us. I think that is all I have to say, Your Honor, unless you have some questions.

THE COURT: Would you care to make a statement, Mr. Van Vactor?

MR. VAN VACTOR: Well, I would only like to say, Your Honor, that this unfortunate affair occurred in the course of a struggle between the two men, the deceased and the defendant. It occurred after there had been considerable drinking going on on the part of both parties. It is a matter which this defendant is now fully and completely repentant and may the record show that he has attempted to cooperate now just as far as it possible for him to do so.

THE COURT: Do you have anything, Knowles, you want to say?

MR. KNOWLES: No, sir.

THE COURT: Well, under the Oregon law -- I know you must have been advised by your counsel -- that second degree murder, the charge to which you have entered a plea of guilty, calls for a mandatory life sentece (sic). You've been advised

f that, I'm sure.

MR. KNOWLES: Yes.

THE COURT: And that is the law of this state. There's o discretion as far as the Court is concerned in the time of entence, it's a mandatory proposition entirely and I know you ealize that. Now, there is this other matter of the charge in he Federal Court down in Sacramento in which you entered a plea f guilty prior to coming here on this charge and to which you ill have to answer Federal authorities and it's my understanding rom the District Attorney and from all concerned that you'll ave to be returned to them for sentencing down there on that harge.

It's the Judgment of this Court that you are guilty of he crime of murder in the second degree as defined by O.R.S. 63.020. It's further ordered, adjudged and decreed that the aid Harry Cecil Knowles be confined to the State Penitentiary at alem, Oregon, for the duration of his natural life, and said mprisonment shall commence from the date of the expiration of he imprisonment under that certain sentence to be imposed upon uch defendant in the District Court of the United States for the orthern District of California, Northern Division, for violation f the Dyer Act, for which a plea of guilty has been received rior hereto, and that he be and he is hereby remanded to the ustody of the Sheriff of Wasco County for delivery to the said istrict Court of the United States for the Northern District of alifornia, Northern Division, for sentencing on said Federal harge. I might say in that connection I am proceeding under ection 137.160 of the Oregon Revised Code where a person has

been convicted of two crimes before judgment on either, Mr. Van Vactor.

It is further ordered, adjudged and decreed that the Sheriff of Wasco County, Oregon, cause to be placed with the proper officer in charge of the institution to which said defendant is committed by the Federal authorities a hold order requesting said defendant to be held for the Sheriff of Wasco County, Oregon, upon completion of such Federal sentence, and the sheriff of Wasco County is further ordered to secure and deliver said defendant to the State Penitentiary at Salem, Oregon, for service of this sentence hereby imposed upon completion of such sentence to be imposed by the District Court of the United States for the Northern District of California, Northern Division. That will be all.

(Thereupon the hearing was concluded.)

STATE OF OREGON)
) ss:
COUNTY OF WASCO)

I, LILLY H. SJOBLOM, Official Court Reporter for the Seventh Judicial District of the State of Oregon, hereby certify that I reported in shorthand the testimony and proceedings had in the above-entitled cause at the hearings had therein before the Honorable M. W. Wilkinson, Circuit Judge, presiding; that I subsequently caused my said shorthand notes to be reduced to typewriting; and that the foregoing transcript, pages number 1 to 13, both inclusive, contains a full, true and accurate record of all the evidence given, objections and motions made, rulings thereon and exceptions taken; and that no exhibits were offered

evidence during said hearings.

DATED at The Dalles, Oregon, this 26th day of November D., 1958.

/s/ Lilly H. Sjoblom
OFFICIAL COURT REPORTER

BACKGROUND EVENTS OCCURRING PRIOR TO APPELLANT'S PLEA OF GUILTY*

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* As we previously stated, this part of our statement of facts in our opinion is neither necessary nor relevant to the decision in this case. See question presented for decision, supra p 8 . We say this because appellant's own testimony that he did not want to plead guilty but did so because of his counsel's advice, see pp 12-14 , supra, indicates that the prior statements that appellant gave the police were not, so far as appellant was concerned, a factor in his decision to plead guilty.

Nevertheless we have set out these circumstances in the appendix, because we do not entirely agree with petitioner's statement thereof at pp 3-16 of his brief and because the lower court made findings of fact thereon and because this court may wish to examine our version of these facts. Reference to "Opin" indicates that the fact stated is the same as that found by the court.

On October 18, 1954, appellant was arrested by agents of the United States and taken before a United States Commissioner in Tallahassee, Florida, for preliminary hearing on an information charging him with the interstate transportation of a stolen 1950 Chevrolet pickup truck which had belonged to one Albert Calvin Stuart. (R 22, par 7; R 58, par VI, Opin R 78, A 3).

Appellant was 46 years old at the time but was unable to read or write well, having attended elementary school only through the fourth or fifth grade. (Tr 22, Tr 144; Opin R 78-79; A 3).

Prior to his arrest by federal authorities appellant had been incarcerated in the county jail at Apalachicola, Florida, and on October 11, 1954, was interviewed there by Charles L. Carroll, a special agent of the Federal Bureau of Investigation. (Tr 138-139; Opin R 79, A 3).

Carroll questioned appellant with respect to the federal motor vehicle theft charge for three quarters of an hour or one hour, but appellant denied knowing anything about the Chevrolet pickup or Stuart's whereabouts. (Tr 64, 67-68, 138-140, 146, Opin R 79; A 3-4).

Appellant explained his refusal to admit knowing Stuart, the deceased, as follows (Tr 68):

"THE COURT: Why weren't you willing to admit your friendship with Mr. Stuart?

THE WITNESS: Well, I didn't really believe that they had anything on me. They didn't tell me that they had my fingerprints and that is how they traced me from the time I left Mr. Stuart. See, we lived together for a while. I didn't believe they had anything on me." (Emphasis supplied)

Carroll advised appellant that any statement he made could be used against him, that he was not obliged to make any statements, and that he had the right to consult an attorney. (Tr 139-140, 145; Opin R 79, A 4).

On October 20, 1954 agent Carroll interviewed appellant a second time at the Federal Correctional Institution in Tallahassee. (Tr 140; Opin R 79, A 4). This interrogation lasted one and a half or two hours. (Tr 146; Opin R 79, A 4).

At the trial Carroll produced a statement prepared in his handwriting, dated October 20, 1954, which was signed by appellant. The statement related solely to the motor vehicle theft charge and contained recitals to the effect that appellant had been advised of his right to consult an attorney and of the fact that the statement could be used against him. (Ex 14; Tr 141-143; Opin R 79, A 4).

On October 29, 1954 agent Carroll interviewed appellant a third time, for a period of about two hours, and he repeated the advice he had given appellant during the previous interviews. (Tr 143-144; Opin R 79, A 4). At this last interview, as well as on the previous two interviews, appellant was also asked as to whether or not he knew of the whereabouts of Stuart (Tr 144, 67), but appellant wouldn't talk to Carroll about Stuart (Tr 67-68).

Appellant remained in federal custody in Flordia throughout October and the first half of November, 1954. Meanwhile, however, he had become the prime suspect in a probable homicide involving the owner of the vehicle (Stuart) which he was charged with having stolen. The California Bureau of Criminal Identification

and Investigation had undertaken the investigation of the suspected homicide and made preparation to interrogate appellant upon his arrival in California (Ex 10, pp a, b; Opin R 79-80, A 4-5).

In an effort to obtain incriminating statements from apellant, Investigator Charles E. Casey of the CII contacted the chief jailor of the Sacramento County Jail on November 11, 1954, and with his cooperation, installed a microphone in a cell on the fifth floor of the jail and a recording unit in the attic of the building. (Ex 8; Tr 10; Opin R 80, A 5). No useful information was obtained from this device. (Tr 10-11, 115-116; Opin R 80, A 5).

On November 12, 1954, appellant was indicted by a federal grand jury in Sacramento, California for violation of the National Motor Vehicle Theft Act, and on November 15, 1954 was transported to Sacramento by train, arriving there at 4:00 p.m. on Wednesday, November 17, 1954. (R 22, par 8; R 58, par VI; Opin R 80, A 5).

At 9:30 o'clock a.m. on Thursday, November 18, 1954, appellant appeared in the United States District Court in Sacramento for arraignment on the indictment. (Ex 3, p 2; Opin R 80, A 5). He was advised by the court that he was entitled to an attorney to assist in the defense of the federal charge, but he declined counsel and entered a plea of guilty, which the court accepted. (Ex 3, pp 2-4; Opin R 80, A 5).

(A)

ATMOSPHERE OF INTERROGATIONS OF APPELLANT CONDUCTED BY CII

Later that same morning at approximately 11:00 a.m., appellant was taken to the office of the United States Marshal in Sacramento for interrogation there by Investigators Charles E. Casey and A. L. Coffey of the CII (R 22, par 11, R 58, par VI; Tr 23; Opin R 80, A 5).

Mr. Casey who was one of appellant's interrogators testified that none of appellant's interrogations lasted over three or four hours (Tr 18). He also testified (Tr 20-21):

> " * * * Mr. Knowles was most cooperative with us. It was a very pleasant exchange of conversation and words. At no time did we ever, as I recall, were there ever any raised voices or anything else in this regard. It was a very amicable interrogation of a witness or of a suspect."

Appellant himself was asked the following questions and gave the following answers concerning Mr. Casey and Mr. Coffey (Tr 58):

> "Q Now, did you have a friendly relationship with Mr. Casey and Mr. Coffey?
>
> A Well, just what do you mean by 'friendly'?
>
> Q Well, did you consider them gentlemen?
>
> A Yes, sir, they was. They was gentlemen all the way through, every bit of the way."

Later appellant in response to a question of the trial court testified (Tr 64):

> " * * * I knew that I had to answer each question that they asked me, and I answered

> way it was all the way through. I thought they was treating me very nice. * * *" (Emphasis supplied)

Mr. Coffey, the polygraph expert (Tr 99) testified as to the atmosphere existing with appellant as follows (Tr 105):

> "Well, we got acquainted during the first interview, which was, I think, about as long as any of them. There was an interchange of cigarettes; there was small talk along the line-- it was not a question and answer situation all the way through-- and there was never anything but a very cordial atmosphere. Mr. Knowles evidenced at no time any reluctance to talk, and at no time appeared to be unwilling to talk." (Emphasis supplied)

(B)

DETAILS OF INTERROGATIONS

OF APPELLANT

At the first interview appellant was interrogated about his responsibility for the disappearance and probable death of Stuart. (R 22, par 11, R 58, par VI; Tr 23; Opin R 80, A 5). Appellant was interrogated until 4:30 p.m.* but made no incriminating statements. (R 22, par 11, R 58, par VI; Tr 23; Opin R 80, A 5).

The object of the interrogation on November 18 was to prepare appellant for a lie detector test and for that reason, Investigator Coffey, who was not earlier connected with the investigation (Tr 114; Opin R 81, A 6), played the principal

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* Apparently there was a break for lunch because according to the testimony of Charles Casey none of the interrogations with appellant lasted over three or four hours (Tr 18).

role in the interrogation. (Tr 100; Opin R 81, A 6).

Coffey had been connected with law enforcement agencies for 23 years and had acquired expertise as a polygraph specialist through practical experience and university training. His education in these matters extended over his entire career in law enforcement and he had taken university course in subjects relevant to the interrogator's art, such as psychology and physiology. (Tr 113; Opin R 81, A 6).

To secure appellant's consent to the test, and to obtain his confidence and prepare him emotionally in order to insure useful results, Coffey undertook to develop a rapport with appellant. (Tr 100-101, 106-107; Opin R 81, A 6). Coffey testified that an air of antagonism would have limited the effectiveness of the examination and that the development of a cordial, friendly atmosphere was prescribed procedure in preparing for a polygraph test. (Tr 108; Opin R 81, A 6). Coffey's prime objective was to create a pleasant atmosphere because such a relationship is more conducive to a meaningful test which may readily be interpreted. (Tr 111, Opin R 81, A 6).

To help achieve the necessary rapport and to obtain appellant's consent to the test, Coffey manifested an attitude of apparent neutrality so far as the conduct of the examination was concerned. (Tr 107; Opin R 81, A 6).

He represented to appellant that he was there to establish the true facts and was as eager to develop facts beneficial to appellant as facts detrimental to him. (Tr 107; Opin R 81, A 6).

Coffey told appellant, " * * * That I am a completely neutral participant in this thing; my only function is to

establish as nearly as possible the true facts of the situation. * * *" (Tr 101; Opin R 81, A 6-7).

Appellant was not advised of his right to counsel or that his statements could be used against him in court (Tr 101; Opin R 81-82, A 7). Coffey did advise petitioner, however, that " * * * I am here in an official capacity, and anything that I get, anything that you provide me, I am obligated to pass along to the people who have responsibility for handling this investigation," (Tr 102; Opin R 82, A 7). Coffey also told appellant that appellant was privileged not to talk to Coffey if appellant was so inclined. (Tr 101-102, Tr 114-115).

On Friday, November 19, 1954 appellant was again taken to the office of the United States Marshal in Sacramento and interrogated by CII Investigators Coffey and Casey from 11:15 a.m. until 4:30 p.m.* (Ex 11, p 36; R 23, par 13, R 59, par VIII, Opin R 82, A 7).

During the course of the interrogation, Investigator Coffey administered a polygraph test to appellant lasting about one and one half hours.

Prior to the giving of the polygraph test on that date Coffey explained to appellant what the polygraph test was, how the questions would be asked and how appellant would answer them, and that if a question was not truthfully answered it would be reflected in the polygraph. (Tr 103). Appellant consented to the test and evidenced no reluctance to undergo the examination. (Tr 106).

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* See footnote p A-36, supra.

During the polygraph test appellant was questioned extensively about his responsibility for the death of Stuart. (R 23, par 14, R 59, par IX, Opin R 82, A 7). Although appellant did not incriminate himself during this interrogation (Tr 25; Opin R 82, A 7), when the polygraph test was completed, Coffey told appellant some of his answers were false. (Tr 116-117; Opin R 82, A 7).

While administering the polygraph test, it was necessary to establish a "normal" response by asking appellant a number of irrelevant questions and occasionally interjecting a question pertinent to the investigation. The admitted object of this procedure was to cause appellant to relax so that his reaction to important questions would be more readily apparent to the investigator than otherwise. (Tr 103, 111; Opin R 82, A 7).

The advice given appellant regarding his rights on November 19, if any, was no different from that given the previous day (Opin R 82, A 7) except that appellant was told by Coffey that appellant was free not to talk if he felt so inclined. (Tr 112).

Appellant was interrogated again on Saturday, November 20, 1954, in the Sacramento County Jail by Investigators Coffey and Casey for two or three hours beginning at 9:30 a.m. (Ex 11, p 36; Tr 25-26; Opin R 82, A 7). As a result of the interrogations, appellant finally orally admitted killing Stuart. (Tr 26; R 24, par 19, R 60, par XIII, Opin R 82, A 8). Coffey told appellant that if he cooperated "it would be a lot easier for me if I did." (Tr 28; Opin R 82, A 8). Appellant was given no advice on November 20 regarding his right to remain silent and his right to counsel. (Tr 26-27; Opin R 83, A 8).

At 9:30 a.m. on Monday, November 22*, 1954 appellant was taken before the United States District Court in Sacramento to be sentenced on his conviction for violation of the Dyer Act, but sentencing was postponed until December 14, 1954. (Ex 3, p 5; Opin R 83, A 8). This postponement was arranged for the express purpose of permitting the CII investigators additional time to interrogate appellant. (Ex 11, p 36; Opin R 83, A 8).

Appellant was again interrogated on November 22, beginning at 11:30 a.m. by Investigators Coffey and Casey in the United States Marshal's office (Ex 11, p 36; R 60, par XIV, Opin R 83, A 8). Appellant was still being interrogated at 1:30 p.m. that afternoon. (Ex 11, p 37; Opin R 83, A 8). Appellant was not told of his right to remain silent or of his right to counsel during this interrogation.** (Tr 29; Opin R 83, A 8).

Inasmuch as appellant had already orally admitted killing Stuart at the interrogation of November 20, 1954, (Tr 25-26; Opin R 82, A 7-8) the purpose of the interrogation on November 22 and the remaining interrogations was to fix the location of the body. (Tr 105).

The CII investigators arranged with the federal probation officer for further postponements of appellant's sentencing should it become necessary to engage in additional interrogations.

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* The court appears to be in error since Ex 3, the transcript of federal proceedings, indicates that the date was Tuesday, November 23. The date used by the court comes from Ex 11, p 36, the CII Report.

** The CII attempted to tape this interrogation, (Tr 29, 95) but through the error of Investigator Casey the tape erased and did not record (Tr 95). That was the only tape recording ever attempted on appellant by the CII (Tr 95-96).

The CII report states: "On November 24, 1954, Investigator Casey contacted George S. Ford, Jr. U.S. Probation and Parole Officer, Federal Building, Sacramento. Mr. Ford was interested in knowing about Knowles and in his activities prior to the time of his arrest on federal charges. Mr. Ford was extremely cooperative and guaranteed this investigator that if additional time was needed for questioning the subject, he believed this time could be granted by arranging same with the federal judge." (Ex 11, p 37; Opin R 83, A 8).

Appellant was again interrogated by the CII investigators on Tuesday, November 30, 1954, in the United States Marshal's office. (R 60, par XIV; Ex 11, p 38; Opin R 83, A 9).

To the best of appellant's recollection, he was questioned from approximately 8 a.m. to 11:30 a.m. and from 1 p.m. until 3:30 or 4 p.m. (Tr 30-31; Opin R 83, A 9).

Don J. Clark, the Prosecuting Attorney of Yakima County, Washington was present during this interrogation (Tr 30, 79-81; Opin R 84, A 9) because appellant believed the death of Stuart had occurred in Yakima, Washington (Ex 11, p 38; Opin R 84, A 9). Clark stated he did not give appellant any cautionary instructions during the interrogation (Tr 87-88; Opin R 84, A 9).

On December 1, 1954, beginning not later than 10:25 a.m. appellant was interrogated in the office of the United States Marshal in Sacramento by Prosecuting Attorney Clark and Deputy Sheriff Dell Young of Yakima County, Washington and by Investigator Casey of the CII, in an attempt to obtain from appellant a written statement admitting that he had caused the death of Stuart in Yakima, Washington (R 24-25, par 21, R 60, par XV;

Tr 31; Opin R 84, A 9).

Clark did not make any promises or threats to Knowles (Opin R 84, A 9). In this regard Clark testified (Tr 83-85):

"Q Now, to get one thing straight, Mr. Clark, before Mr. Knowles signed this statement did you read the entire statement back to him?

A I read the entire statement to him. He was very cooperative. There was no problem at all about him giving me the statement. The essence of the statement he had given to us many times prior; I mean, any time we would ask him, he would just give it to us.

* * *

Q Now, in taking this statement, prior to taking this statement did you promise or represent to Mr. Knowles that if he cooperated with you he would only be charged with second degree murder?

* * *

A Did I promise him anything? My answer is no.

Q Did you promise that you would recommend an early parole if he cooperated with you?

A No.

Q Did you make any statement that the State of Washington would put a rope around his neck for murder?

A No."

Further, in Ex 6, the transcribed statement of appellant taken in the afternoon of December 1, 1954, following the morning interrogation by Clark above mentioned, the following appears (Ex 6, p 1):*

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* During the quoted preliminary questions Clark was not in the room. Thus at the bottom of p 2 of Ex 6, the following appears:

"Q For purposes of the record, Prosecuting Attorney, Don J. Clark just entered the room. You know Mr. Clark also, Shorty?

A Yes."

"COFFEY: Harry, we have met before. My name is, as you know, Al Coffey, State Bureau of Criminal Identification and Investigation. You have met Charles E. Casey, of the same, and Dell Young of Yakima, Washington, and a few minutes ago I introduced you to Mrs. Parker who is the shorthand reporter here. The thing we came up here for is to take a shorthand statement from you so that we can enlarge on this statement you gave to Mr. Clark, who is the District Attorney, or Prosecuting Attorney from Yakima County, Washington. Now before we go any further, I would like to ask you at this time, at this point, if during this time you have been down here and and (sic) having a conversagion (sic) with Pat Casey and myself and with Clark, the prosecutor from Yakima whether or not anybody along the line has made you promises or has used any threats or any rough treatment or duress of any sort. Has anybody done that?

A Absolutely no.

Q We have not told you that we would intercede for you or do anything other than treat the case on its own merits?

A * * * Absolutely no." (Emphasis supplied)

See also footnote, p A-15 supra, which contains similar questions and answers given at the close of the statement.

Returning now to the morning interrogation of December 1, 1954, appellant agreed to give Clark a written confession, and Clark then prepared a statement in his own handwriting which appellant signed. (Ex 4; Tr 82-84; Opin R 84, A 9). Clark prepared the statement for use in a subsequent prosecution (Tr 82; Opin R 84, A 9).

Clark corrected a number of mistakes in the statement which he had made intentionally and then had appellant initial the corrections in accordance with a common police procedure for establishing that a witness has read a statement. (Tr 85, Opin

R 84, A 9). Clark had told appellant that he did not have to talk, and that any statement he made could be used against him. (Opin R 84, A 9-10).

In this regard Clark testified as follows (Tr 82):

"Q Before questioning Mr. Knowles on that date did you give him any cautionary instructions?

A Due to the fact that I was looking for a body only-- and before we took the statement I told Mr. Knowles, I explained to him that he didn't have to talk to me and that, 'You should have an attorney,' and recommended strongly that he have an attorney; my thought being the attorney would tell him that the location of the body isn't going to make any difference, 'tell them where the body is.'"

Further the last sentence of Ex 4, p 4, recites:

"I am aware of the fact that whatever I say or said herein may be used against me."

This recital was read to appellant before appellant signed the statement because Clark testified (Tr 83-84):

"Q Now, to get one thing straight, Mr. Clark, before Mr. Knowles signed this statement did you read the entire statement back to him?

A I read the entire statement to him. * * *"

And at pp 91-92 of the transcript Clark so testified on cross-examination.

During the afternoon of Wednesday, December 1, 1954, appellant was further interrogated by Investigator Coffey of the CII between the hours of 2 p.m. and 3:02 p.m. in the presence of Prosecuting Attorney Clark* and CII Investigator

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* Clark, however, was not present during the initial questions. See footnote p A-42 supra.

Casey* (R 25, par 24, R 60, par XVII; Ex 6; Opin R 84, A 10).

On Friday, December 10, 1954, the United States District Court in Sacramento entered an order releasing appellant into the custody of the Sheriff of Hood River County, and appellant was then transported into Oregon by automobile, arriving in Klamath Falls on Friday, December 10, 1954. (R 26, par 26, R 61, par XVIII; Ex 11, p 40; Opin R 85, A 10).

During the trip into Oregon, appellant was accompanied by CII Investigator Casey, Sergeant U'Ren and Sheriff Gillmouthe of Hood River County, who questioned him about the location of Stuart's body and the details of his trip into Oregon with Stuart in 1953. (Tr 36-37; Ex 13, p 1; Opin R 85, A 10). He was given no advice regarding his rights during questioning. (Tr 37; Opin R 85, A 10).

On Sunday, December 12, 1954, Stuart's body was located and exhumed at Shaniko, Oregon. (R 26, par 27, R 61, par XIX, Opin R 85, A 10). Appellant was interrogated further at the site by Lt. Tucker of the Oregon State Police, Prosecuting Attorney Clark and CII Investigator Casey, and as a result of the interrogation admitted killing Stuart at Shaniko, Oregon. (R 61, par XIX; Ex 11, p 42; Opin R 85, A 10-11).

Appellant was not advised of his right to counsel or of his right to remain silent during the interrogation. (Tr 38; Opin R 85, A 11).

At approximately 3:30 p.m. on Sunday, December 12, 1954, appellant was returned to Oregon State Police Headquarters at

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* See p A-43, supra, and footnote p A-15, supra, which contain the cautionary instructions given during this interrogation.

The Dalles, Oregon, (Ex 11, p 43; Tr 38; Opin R 85, A 11), and Prosecuting Attorney Clark introduced him to District Attorney Donald Heisler of Wasco County, Oregon (Tr 40; Opin R 85, A 11). Clark told Heisler "This fellow has been very cooperative with us all the way along the line." (Tr 87; Opin R 85, A 11).

Clark also testified that he did not have any discussion with District Attorney Heisler concerning a parole for appellant. (Tr 87). Heisler also testified that he didn't have such a conversation with Clark (Tr 127).

During the evening of Sunday, December 12, 1954, starting at approximately 7:45 p.m. appellant was interrogated further at Oregon State Police Headquarters in the presence of Sergeant U'Ren, Lt. J. Eric Tucker and Captain Gurdane all of the Oregon State Police, Ernest Mosier, Sheriff of Wasco County, Investigator Casey of the CII, Donald E. Heisler, District Attorney for Wasco County, and M. D. Van Valkenburgh, Deputy District Attorney for Wasco County. (Ex 5; Tr 41, 121-122; Opin R 86, A 11).

During the interrogation, District Attorney Heisler, prepared a typewritten statement in narrative form which appellant signed. (Ex 5; Tr 121-123; Opin R 86, A 11). A number of typographical errors were corrected and the officials had appellant initial the corrections (Tr 123; Opin R 86, A 11).

Appellant acknowledged in the statement that the statement was given voluntarily and without fear, threats or promises of reward, and after having been told that the statement could be used against him. (Ex 5; Tr 122-123). The mentioned cautionary instructions were given to appellant at the beginning of the statement (Tr 122-123). The statement was read back to appellant

after it was completely typed and before appellant signed the statement (Ex 5, p 3; Tr 123).

Although appellant's temporary release from federal custody was accomplished by means of a writ of habeas corpus ad prosequendum for the alleged purpose of prosecuting appellant in Hood River County for larceny, at no time while appellant was in the custody of the Oregon authorities was he taken before the Justice Court of Hood River, or any other magistrate, for arraignment and preliminary hearing on the larceny complaint filed in the justice court (R 26, par 29, R 61, par XXI; Opin R 86, A 11-12).

On Monday, December 13, 1954, appellant was returned by automobile to the custody of the United States Marshal in Sacramento, California. (R 27, par 30, R 61, par XXII, Opin R 86, A 12).

On Tuesday, December 14, 1954, appellant again appeared before the United States District Court in Sacramento, but sentencing was further postponed at the request of the probation officer. (Ex 3, p 6; Opin R 86, A 12).

On Wednesday, December 15, 1954, the Sheriff of Wasco County, Oregon, filed an information in the Justice Court of The Dalles, charging appellant with murder in the second degree and a warrant for appellant's arrest was issued by that court (Tr 133; Opin R 86, A 12).

On Friday, December 17, a petition for a writ of habeas corpus ad prosequendum was filed in the Circuit Court of Wasco County to obtain appellant's release from federal custody and a writ was issued the same day. (R 27, par 31, 32, R 61, par XXII, Opin R 87, A 12).

On Monday, December 20, 1954, appellant appeared before the United States District Judge in Sacramento who honored the writ of habeas corpus and ordered that appellant be released in the custody of the Oregon authorities on condition that he be returned to federal custody in Sacramento on or before December 30, 1954, ten days later. (R 27, par 33, R 61, par XXII, Opin R 87, A 12).

Sheriff Mosier of Wasco County and District Attorney Donald Heisler of Wasco County (Tr 118) transported appellant to The Dalles by automobile, arriving there during the afternoon of Tuesday, December 21, 1954. (R 27, par 34, R 61, par XXII, Opin R 87, A 12). During the trip appellant was questioned about his travels with Stuart but he was not advised of his right to remain silent or of his right to assistance of counsel. (Tr 46; Opin R 87, A 12-13).

T A B L E

RE: ADMISSION OF EXHIBITS

Exhibit No.	Identified	Offered	Reviewed
1-7	6-7	6-7	7
8, 10-13		17	17
14	141-142	142	143

STATUTES CITED IN BRIEF

ule 52 (a) Federal Rules of Civil Procedure:

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b). As amended Jan. 21, 1963, eff. July 1, 1963."

RS 51.040 (1953 Replaced Parts):

"A justice's court has jurisdiction of the following crimes committed or triable in their respective counties:

"(1) Larceny, where the punishment may be imprisonment in the county jail or by fine.

"(2) Assault, and assault and battery, not charged to have been committed with intent to commit a felony, or in the course of a riot, or with a dangerous weapon, or upon a public officer in the discharge of his duties.

"(3) Any misdemeanor defined and made punishable by ORS 164.430.

"(4) Any misdemeanor defined and made punishable by ORS 166.120 or 166.130.

"(5) Any misdemeanor defined and made punishable by any provision of ORS 164.840, 167.525 and 783.600.

"(6) Any misdemeanor defined and made punishable by ORS 453.320 and subsection (9) of ORS 453.990."

RS 51.050 (1953 Replaced Parts):

"In addition to the criminal jurisdiction of justices' courts already conferred upon and exercised by them, justices' courts have jurisdiction of all misdemeanors committed or triable in their respective counties, where the punishment prescribed does not exceed three months' imprisonment in the county jail, or a fine of not more than $100."

RS 133.030 (2):

"The following persons are magistrates:

"(2) Judges of the circuit court;"

RS 133.610 (1957 Replaced Parts):

"When the defendant is brought before a magistrate upon an arrest, either with or without warrant, on a charge of having committed a crime, the magistrate shall immediately inform him of the charge against him and of his right to the aid of counsel before any further proceedings are had."

RS 133.620 (1957 Replaced Parts);

"The magistrate shall allow the defendant a reasonable time to send for counsel and shall adjourn the examination for that purpose. Upon the request of the defendant, the magistrate may require a peace officer to take a message to such counsel in the precinct, town or village the defendant names. The officer, when required by the magistrate, shall take the message without delay."

RS 133.630 (1957 Replaced Parts):

"Immediately after the appearance of counsel or if, after waiting a reasonable time, none appears or if the defendant does not require counsel, the magistrate shall proceed to examine the case."

ORS 161.030 (1953 Replaced Parts):

"(1) Crimes are divided into felonies and misdemeanors.

"(2) A felony is a crime which is punishable with death or by imprisonment in the penitentiary of this state. When a crime punishable by imprisonment in the penitentiary is also punishable by a fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes, after a judgment imposing a punishment other than imprisonment in the penitentiary.

"(3) Every crime not included in subsection (2) of this section is a misdemeanor."

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN N. JOHNSON, Appellant, vs. PEOPLE OF THE STATE OF CALIFORNIA, Appellee.	)	No. 21219

APPELLEE'S BRIEF

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN N. JOHNSON, Appellant, vs. PEOPLE OF THE STATE OF CALIFORNIA, Appellee.	)	No. 21219

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for writ of habeas corpus was invoked under Title 28, United States Code sections 1915, 2241, 2243, and 2254. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has been issued.

STATEMENT OF THE CASE

Appellant has appealed from an order of the United States District Court for the Northern District of California, denying his petition for a writ of habeas corpus.

A. Proceedings in the State Courts

On July 2, 1964, appellant pleaded guilty to violating section 274 of the California Penal Code (abortion). He was subsequently sentenced to serve the term prescribed by law (TR 2, 12, 29-30, 35[1]/: AOB 2). There was no appeal.

At some time subsequent thereto, appellant filed a Motion to Vacate in the Superior Court for Alameda County, said motion being denied on December 8, 1964 (TR 2, 12; AOB 2). He appealed that denial to the District Court of Appeals for the State of California, First Appellate District, which court on September 15, 1965, dismissed the appeal without prejudice to the filing of a petition for a writ of habeas corpus (TR 2-3, 12; AOB 2). A petition for hearing in the California Supreme Court was thereupon filed, said petition being denied on November 10, 1965 (TR 2-3, 12; AOB 3).

Appellant then filed applications for the writ of habeas corpus in the Superior Court for the County of Marin and in the California Supreme Court, both of which were denied without comment (TR 5-6, 13; AOB 3).

B. Proceedings in the Federal Courts

On February 9, 1966, appellant filed a petition for habeas corpus in the United States District Court for the

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1. "TR" refers to the transcript of record on the proceedings in the District Court.

Northern District of California (TR 1-26; AOB 3). An Order to Show Cause issued (TR 28), appellee filed a return thereto (TR 29-35), and appellant filed his traverse (TR 43-54). The Honorable George B. Harris, Chief Judge, denied the petition by an order filed on May 6, 1966 (TR 55-57).

On June 6, 1966, Chief Judge Harris granted petitioner's application for a certificate of probable cause and for leave to appeal in forma pauperis (TR 63).

Notice of appeal was filed on July 12, 1966 (TR 64-65).[2/]

SUMMARY OF APPELLEE'S ARGUMENT

I. Appellant's plea of guilty forecloses collateral attack of his conviction on the grounds that it resulted from illegally obtained evidence.

II. Appellant has failed to allege facts showing a coerced plea of guilty.

III. Appellant has not shown that he received ineffective aid of counsel.

ARGUMENT

I

APPELLANT'S PLEA OF GUILTY FORECLOSES COLLATERAL ATTACK OF HIS CONVICTION ON THE GROUNDS THAT IT RESULTED FROM ILLEGALLY OBTAINED EVIDENCE.

Appellant repeats here on appeal basically the

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2. Appellant's notice of appeal was not timely filed, see Rule 37 (a), Federal Rules of Criminal Procedure.

same facts and allegations with reference to an alleged "coerced" confession that he made in the court below. The only notable difference is that in this Court, he cites People v. Dorado, 62 Cal.2d 338 (1965) (AOB 7-8).

Of course, in so doing, he completely overlooks (or disregards) the fact that because of his plea of guilty, he is foreclosed from collaterally attacking his conviction on the ground that statements made by him to police officers were obtained by illegal means. Harris v. United States, 338 F.2d 75, 80 (9th Cir. 1964); United States v. French, 274 F.2d 297 (7th Cir. 1960); United States v. Sturm, 180 F.2d 413 (7th Cir. 1950); Kinney v. United States, 177 F.2d 895 (10th Cir. 1949). (TR 55).

II

APPELLANT HAS FAILED TO ALLEGE FACTS SHOWING A COERCED PLEA OF GUILTY

The opinion of the District Court, in its order denying appellant's petition, discusses appellant's claim of a "coerced" plea of guilty in detail, and, we submit, completely disposes of that issue on this appeal (TR 56-57).[3/]

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3. "Petitioner also maintains that his plea of guilty was 'coerced.' According to petitioner he confessed after a police officer had informed him 'that failure to do so would result in petitioner being charged of one count of conspiracy to commit an abortion and one count of abortion; that the other two men would be charged of one count of conspiracy to commit abortion; and that petitioner's pregnant wife would be charged

It is noteworthy that appellant does not allege any newer or different facts in reference to the circumstances which assertedly were coercive which would counter the correctness of the opinion of the District Court. If anything, appellant may be said to have abandoned his claim, because, save for the bare allegation contained in his "Argument" preface (AOB 5-6), he makes no reference to the "coerced" plea in the body of the brief on appeal.

III

APPELLANT HAS NOT SHOWN THAT HE RECEIVED INEFFECTIVE AID OF COUNSEL

As with the prior allegations, the instant contention is but a condensed version of the identical question brought

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with the possession of the narcotics found, and subsequently petitioner's infant daughter would be turned over to the juvenile authorities. Nevertheless, petitioner alleges, he then entered a plea of not guilty to the one count of criminal abortion with which he was charged. The police officer then informed petitioner that unless the plea was changed to guilty his wife would be charged with narcotic violations and petitioner might be charged with more than one count of abortion. After that, and on advice of counsel, petitioner entered his plea of guilty.

To believe petitioner, it must be assumed that the consequences originally outlined to him by the police were sufficient to secure a confession but not to produce a plea of guilty, and that the subsequent lesser consequences outlined to him by the police did result in a coerced plea of guilty even after consultation with counsel. A claim of coercion must be based on more convincing allegations. Hodge v. Heinze, 165 F.Supp. 726, 729 (N.D. Cal. 1958).

Furthermore, such allegations establish no coercion whatsoever. See Cortez v. United States, 337 F.2d 699 (9th Cir. 1964)."

before the District Court below and resolved against appellant (TR 23-25, 55-56). The essence of this argument is that the public defender erred when he advised appellant to withdraw his plea of guilty "even though he had earlier informed appellant that the circumstances of the arrest was a good defense." (AOB 9). Appellant does not show that the "circumstances of the arrest" actually constituted a good defense which was omitted through error of counsel, or that counsel was "so incompetent or inefficient as to make the trial a farce or a mockery of justice." He has thus failed completely to show ineffective aid of counsel, and his conclusionary allegations must be disregarded. Reid v. United States, 334 F.2d 915, 919 (9th Cir. 1964); Schlette v. California, 284 F.2d 827 (9th Cir. 1960).

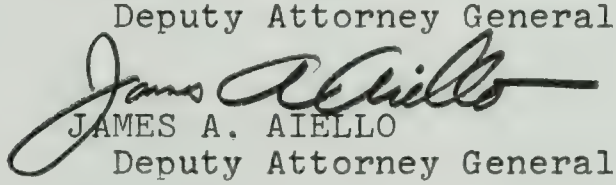
CONCLUSION

For the reasons stated above, it is respectfully submitted that the order of the District Court denying appellant's petition for the writ of habeas corpus should be affirmed.

DATED: October 17, 1966

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General



JAMES A. AIELLO
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Attorneys for Appellee.

JAA:cmd
CR SF
66-143

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED:

JAMES A. AIELLO
Deputy Attorney General
of the State of California

No. 21,222

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

P. R. McCLUNG,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

MITCHELL ROGOVIN,
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FILED

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 21,222

P. R. McCLUNG,

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COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE
TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum finding of fact and the opinion of the Tax Court (Doc. No. 23) are not officially reported.

JURISDICTION

This petition for review (Doc. No. 25) involves federal income taxes for the year 1960. The Commissioner of Internal Revenue mailed to the taxpayer a notice of deficiency dated January 23, 1964, asserting deficiencies in those taxes in the aggregate amount of $160.06. Within 90 days thereafter on April 22, 1964, the taxpayer filed a petition (Doc. No. 2) with the Tax Court, for a

redetermination of those deficiencies under the provisions of Section 6213 of the Internal Revenue Code of 1954. The decision of the Tax Court was entered on April 22, 1966. (Doc. No. 24.) This case is brought to this Court by petition for review filed on June 21, 1966 (Doc. No. 25), within the three-month period prescribed in Section 7483 of the Internal Revenue Code of 1954. Jurisdiction is conferred on this Court by Section 7482 of that Code.

QUESTION PRESENTED

Did the Tax Court correctly disallow certain deductions claimed by the taxpayer on the ground that they were not substantiated by the evidence of record?

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

> SEC. 162. TRADE OR BUSINESS EXPENSES.
>
> (a) In General.--There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including--
>
> * * *
>
> (26 U.S.C. 1964 ed., Sec. 162.)
>
> SEC. 165. LOSSES.
>
> * * *
>
> (c) Limitation on Losses of Individuals.--In the case of an individual, the deduction under subsection (a) shall be limited to--

(1) losses incurred in a trade or business;

(2) losses incurred in any transaction entered into for profit, though not connected with a trade or business; and

* * *

(26 U.S.C. 1964 ed., Sec. 165.)

SEC. 212. EXPENSES FOR PRODUCTION OF INCOME.

In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year--

(1) for the production or collection of income;

* * *

(26 U.S.C. 1964 ed., Sec. 212.)

Treasury Regulations on Income Tax (1954 Code):

§ 1.162-5 [As amended by T.D. 6918, 1967-21 Int. Rev. Bull. 8] Expenses for education.

(a) General rule. Expenditures made by an individual for education (including research undertaken as part of his educational program) * * * are deductible as ordinary and necessary business expenses (even though the education may lead to a degree) if the education--

(1) Maintains or improves skills required by the individual in his employment or other trade or business, or

(2) Meets the express requirements of the individual's employer, or the requirements of applicable law or regulations, imposed as a condition to the retention by the individual of an established employment relationship, status, or rate of compensation.

* * *

(26 C.F.R., Sec. 1.162-5.)

STATEMENT

The facts as found by the Tax Court may be stated as follows:

P. R. McClung (hereafter referred to as taxpayer) filed a join federal income tax return with his wife for the taxable year 1960 with the District Director of Internal Revenue at Los Angeles, California. (Doc. No. 23, p. 1.)

On his return the taxpayer claimed deductions of $874.01 for losses and expenses incurred in business transactions entered into w a hope for profit, and $199.86 for educational expenses incurred by his wife (Doc. No. 23, p. 2). The Commissioner disallowed the clain deductions and determined an income tax deficiency of $160.06 (Doc. 23, pp. 1, 2).

During the year in question the taxpayer was employed by the Southern California Presbyterian Homes as a maintenance man; his dut consisted of fixing doors, unstopping plumbing, and handling maintenance jobs of that nature. (Doc. No. 23, p. 2). He contended tha since 1932, he had also engaged in various business ventures with a view to profit and that the deductions he took in his 1960-tax year were related to his ventures for that year. (Doc. No. 23, p. 2 The nature of these business ventures was not revealed to the Tax Court which found his answers "indefinite and unresponsive". (Doc. No. 23, p. 2.) From the type of expenses claimed (e.g. patent drawing photostats, and Geological Survey Maps) one might speculate that these ventures related to mining and patents, but nothing more definite can be stated. The taxpayer's income tax returns for the years 1959, 1960, and 1961 reflect only income from wages and salaries. (Doc. No. 23, p. 2.) He admitted that he had not made any profit from his alleged ventures since

1932, except perhaps in one year which he could not identify; and that even the amount of the alleged profit for such year was minimal. (Doc. No. 23, p. 2.) The Tax Court found (Doc. No. 23, pp. 2-3) that the taxpayer did not maintain any business books or records and also that he failed to produce any evidence in the Tax Court to substantiate any of his alleged business losses or expenses or their deductibility.

Taxpayer also deducted on his return for the year here involved, an item of $199.86 which he therein described as "Schooling to Maintain and Improve Skills." The Commissioner disallowed this deduction. (Doc. No. 23, p. 2.) In the Tax Court the taxpayer testified that this item represented educational expenses incurred by his wife who was a nurse. Although the taxpayer's wife was not called upon to testify, it appears that she was a nurse's aide at a rest home, and that she terminated her employment to attend college with the intention of becoming a licensed vocational nurse. (Doc. No. 18, p. 56, 57.) The Tax Court found that the taxpayer failed to substantiate any particular expense so incurred; and failed to present any evidence which would tend to establish that any such expense was incident to maintaining or improving any of his wife's skills. (Doc. No. 23, p. 2.) The Tax Court in sustaining the deficiency as determined by the Commissioner held that both of the claimed deductions should be denied on the ground that the taxpayer had failed to carry his burden of proof with respect to their deductibility. (Doc. No. 23, p. 3.)

From that action the taxpayer has filed and prosecuted the instant petition for review. (Doc. No. 25.)

SUMMARY OF ARGUMENT

The taxpayer seeks deductions claimed to represent losses and expenses incurred in business transactions entered into with a hope for profit and educational expenses allegedly incurred by his wife in maintaining and improving her nursing skills.

The taxpayer has failed to state the Code sections upon which he bases these claimed deductions, however it appears that if the claimed deductions are allowable they would fall within the purview of Sections 162(a), 165(c)(1) and (2), or 212 of the Internal Revenue Code of 1954. It is well established that a taxpayer who claims deductions under these sections has the burden of establishing his right to such deductions. The Commissioner's determination in this regard is presumptively correct and the burden rests upon the taxpayer to overcome such presumption by sufficient proof. The Commissioner determined that the deductions claimed by the taxpayer in the instant case were not allowable. The Tax Court determined that the taxpayer had failed to prove that he was entitled to the claimed deductions and that the Commissioner's determination must stand in the light of the taxpayer's insufficient proof. The record shows that the taxpayer failed to substantiate these claimed deductions after being given every reasonable opportunity to do so by the Tax Court, the decision should be affirmed.

ARGUMENT

THE TAX COURT CORRECTLY DISALLOWED DEDUCTIONS CLAIMED BY THE TAXPAYER ON THE GROUND THAT THE DEDUCTIONS WERE NOT SUBSTANTIATED BY THE EVIDENCE OF RECORD

A. The Tax Court correctly held that the taxpayer had failed to substantiate his claim to deductions for alleged business expenses and losses for the taxable year 1960

Sections 162 and 212 of the Internal Revenue Code of 1954, supra, permit a deduction from gross income for ordinary and necessary expenses paid or incurred in carrying on a trade or business, or expenses incurred for the production of income. Subsections (c)(1) and (2) of Section 165 of the Internal Revenue Code of 1954, supra, also permit a deduction for losses incurred in a trade or business and losses incurred in any transactions entered into for profit, though not connected with a trade or business. Since these deductions, like other deductions, are a matter of legislative grace, the taxpayer must establish his right to the particular deduction claimed and its proper amount. Burnet v. Houston, 283 U.S. 223; New Colonial Co. v. Helvering, 292 U.S. 435; E. & J. Gallo Winery v. Commissioner, 227 F. 2d 699 (C. A. 9th); South Jersey Sand Co. v. Commissioner, 267 F. 2d 591 (C. A. 3d); Patten Fine Papers v. Commissioner, 249 F. 2d 776 (C. A. 7th). This principle is in keeping with the rule that the determination of a deficiency in tax by the Commissioner is presumptively correct and the taxpayer has the

burden of showing it to be incorrect. Welch v. Helvering, 290 U.S. 111; Jacobs v. Commissioner, 224 F. 2d 412 (C. A. 9th); Strawder v. Commissioner, 277 F. 2d 753 (C. A. 5th).

In the instant case the taxpayer seeks a deduction in the amount of $874.01, claimed to represent losses and expenses incurred in business transactions entered into with a hope for profit. (Doc. No. 23, p. 2.) This amount was disallowed as a deduction by the Commissioner (Doc. No. 23, p. 2), and such disallowance was sustained by the Tax Court for lack of substantiation (Doc. No. 23, p. 3).

The difficulty with the taxpayer's case is that despite a hearing which lasted one hour and twenty minutes, he never identified the trade or business, or profit-seeking enterprise in connection with which the deductions were sought. From the nature of some the expenses claimed, one might surmise that the ventures had something to do with mining and patents, but we know nothing more definite. Furthermore, the bulk of the deductions were for customary personal expenditures like automobile travel, parking, and stationery, so that even if the taxpayer were involved in some sort of profit-seeking venture, it is impossible to say that the expenses were related to it.

The Court questioned the taxpayer about his ventures and his alleged expenses and found his answers indefinite and unresponsive. The difficutly which faced the court can be demonstrated by the following typical colloquy (Doc. No. 18, p. 31-33):

Q Not at this time. Would you explain to the Court and myself, if you would, exactly what you claim your business is? I fail to understand at this time.

A Now, listen, these are transactions.

MR. WHITE: Your honor, we would request that petitioner answer the question and explain to the Court and respondent what his business is so we will at least know where to proceed.

THE WITNESS: May I read something that was taken from Black's law dictionary?

THE COURT: We won't argue that now. He wants you to tell now, in your own words, not what Black said. I know your theory, at least what you have been saying, that you have to have a profit motive. That is your argument.

THE WITNESS: May we have the reporter read what I said about Sears Lake in those patent transactions?

THE COURT: It would be some job go find it. Suppose you restate it now. What is your business? You say two thirds of this mail box is for business, $62 in postage is all for business. What business?

THE WITNESS: I entered these transactions, certain deals, for the purpose of making a profit. They had good prospects, and I put money in it, and I realized it was wasted.

Now, I don't think I am alone in putting money out on things that look good.

THE COURT: Is it not clear to me what kind of thing you though was a good business, and how much money you put in.

You say you put money in. What money did you put in? What was the business? You have talked about fixing doors and plumbing.

THE WITNESS: Your honor, that was my occupation for a livelihood; these are outside. The question before us involves these deals I entered.

THE COURT: What deals?

THE WITNESS: Those up on Sears Lake, and those patents, and it involved so much patent research.

MR. WHITE: Your honor, respondent at this time is going to state that he could not, from what Mr. McClung has testified, ascertain what business he would be in, and the burden of proof being on the petitioner we feel we are just trying to help him in substantiating some of his case.

However, with no cooperation, we have no choice but to move the Court to find for the respondent in this instance, because he was clearly not following the purview of any section of the Internal Revenue Code, your honor.

THE WITNESS: When my turn comes to argue I will present the laws here on such deals, even though they are not a taxpayer business, they were transactions the expenditures in which are deductible.

I have a list of laws here on that, when my turn comes to make the presentation.

THE COURT: Well, you can put those in a brief. I am not going to read law here on the bench now. I am here to gather the evidence and gather the facts.

Now, I want to know what kind of business it is. He has asked you for your business. You have mentioned activities that you engaged in.

THE WITNESS: That is the word; that is a good word.

On the basis of this and similar testimony the Tax Court correctly concluded (Doc. No. 23, p. 2-3):

> He did not maintain any business books or records of any sort; and there is no evidence which would substantiate any of his alleged business losses or expenses, or the deductibility thereof. In this situation we here find and hold that petitioner has failed to carry his burden of establishing any error in respondent's disallowance of the claimed business losses and expenses above mentioned.

Since the burden was upon the taxpayer to rebut the presumptive correctness of the Commissioner's determination, the Tax Court was more than justified upon this record in determining that the taxpayer had failed to carry that burden. This issue presented a pure question of fact and there was a failure of proof on the taxpayer's part. Accordingly, the Tax Court's decision being in harmony with the record facts should be affirmed. Commissioner v. Duberstein, 363 U.S. 278.

B. The Tax Court properly disallowed the claimed educational expense deduction for the taxable year 1960 on the ground that the claimed deduction was not substantiated

As we have pointed out, supra, Section 162(a) permits a deduction for ordinary and necessary expenses incurred in carrying on a trade or business. Treasury Regulations on Income Tax, Section 1.162-1(a), supra, allows a deduction for expenditures made by a taxpayer for education, if the education maintains or improves the skills required by the taxpayer in his employment, or other trade or business, or meets the express requirements of the taxpayer's employer, or the requirements of the applicable law or regulations, imposed as a condition to the retention by the individual of an established employment relationship status, or rate of compensation. Taxpayer in his

return for 1960 deducted an item of $199.86, which he therein described as for "Schooling to Maintain and Improve Skills." (Doc. No. 23, p. 3.) The Commissioner disallowed the claimed deduction in its entirety. (Doc. No. 23, p. 23.) In the Tax Court the taxpayer testified that the claimed deduction represented educational expenses incurred by his wife who was a nurse.

The taxpayer testified that his wife was working as a practical nurse, that she attended Mount San Antonio College, that she received the same salary when she resumed work at the end of the course as she had before, and that she took the course to increase her proficiency and to maintain her ability. (Doc. No. 18, p. 54.) Since that testimony was undeniably vague and indefinite, counsel for the Commissioner indicated to the Court his understanding of the facts on the basis of independent investigation of the issue. Those facts showed, according to counsel (Doc. No. 18, p. 58):

> * * * that Mrs. McClung was working, she quit work, she attended school, which we believe was with the intent of becoming a licensed vocational nurse, which is no longer maintaining and improving present skills and capacities, and then, because of the illness of one of her children, had to terminate her employment where she went with another

> independent hospital not related to the first.
>
> Therefore, as a matter of law, she would not be entitled to any deduction.

In addition to the legal question, counsel pointed out that the taxpayer had failed to demonstrate that the expenses he claim were actually incurred, were related to his wife's education, or not already been deducted from their income (see Doc. No. 18, pp. 57, 58). Thus, the Tax Court was forced to conclude that the taxpayer had (Doc. No. 23, p. 3):

> * * * failed to substantiate any particular expense so incurred; and he presented no evidence which would tend to establish that any such expense was incident to maintaining or improving any of his wife's skills. We hold therefore that the petitioner has failed to carry his burden of proof as to the deductibility of the alleged expense here considered.

As previously noted, the burden is upon the taxpayer to establish his right to any claimed deduction. It is clear from the record in the instant case that the taxpayer has failed to carry that burden. This being the case the Tax Court in accordance with the record properly sustained the Commissioner's disallowance of the claimed deduction.

CONCLUSION

For the reasons stated above, the Tax Court is correct with respect to the issues dealt with by it and accordingly such decision should be affirmed.

Respectfully submitted,

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Attorneys,
Department of Justice,
Washington, D.C. 20530.

September, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of _____, 1967

_____
Chester C. Davenport

NO. 21226

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

O'DELL MARSHALL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
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FILED

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WM. B. LUCK, CLERK

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NO. 21226

IN THE UNITED STATES COURT OF APPEALS

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UNITED STATES OF AMERICA,

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APPELLEE'S BRIEF

I

STATEMENT OF JURISDICTION

On January 19, 1966, appellant was indicted, in three counts, by the Federal Grand Jury for the Southern District of California, Central Division, for transporting and selling marihuana on December 2, 1965, in violation of Title 21, United States Code, Section 176a, and transferring marihuana without obtaining an order form in violation of Title 26, United States Code, Section 4742(a) [C. T. 2]. [1/] Following a trial by jury before the Honorable Irving Hill,

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1/ "C. T." refers to the Clerk's Transcript.

United States District Judge, from March 21, 1966, to March 22, 1966, appellant was found guilty of all counts of the indictment [C. T. 52].

Appellant was convicted and sentenced on April 18, 1966, to the custody of the Attorney General for seven years on each count, the sentences to begin and run concurrently [C. T. 55].

Appellant filed, on April 18, 1966, a timely Notice of Appeal [C. T. 57].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Section 3231 and Title 21, United States Code, Section 176a.

This Court has jurisdiction to review the judgment pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Title 21, United States Code, §176a provides as follows:

> "Notwithstanding any other provision of law, whoever knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marijuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marijuana after

being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

"As used in this section, the term 'marijuana' has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954."

Title 26, United States Code, Section 4742(a) provides as follows:

"(a) General requirement. -- It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate."

III

QUESTIONS PRESENTED

1. Whether the use of a transmitting device by a party to a conversation requires the exclusion of evidence obtained when no objection is made in the trial court.

2. Whether Section 4742(a) of Title 26, United States Code, is unconstitutional as a deprivation of a man's right not to incriminate himself.

IV

STATEMENT OF FACTS

On December 2, 1965, at approximately 6 o'clock P. M., an informant met with two Agents of the Federal Bureau of Narcotics and two members of the Los Angeles Police Department [R. T. 18]. 2/ The informant was acting in such capacity as a volunteer, and not because of any arrest [R. T. 31]. At the time of meeting with the law enforcement personnel, the informant's car and person were searched for contraband and the search proved negative [R. T. 64]. Thereafter, the informant was given $250 and a Fargo transmitter was affixed to his person [R. T. 64]. The Fargo worked [id.].

The informant, in his own vehicle, was followed to a location where he picked up one Sam Pastorello [R. T. 19, 65]. The two

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2/ "R. T." refers to the Reporter's Transcript.

then proceeded to 1320 South St. Andrews, in Los Angeles [R. T. 21]. Upon entering an apartment at said address, the informant was introduced to a Penny and the appellant, O'Dell Marshall [R. T. 21].

The informant told appellant he wanted to buy two kilograms of marihuana [R. T. 22]. The appellant stated it was not available in the apartment, and he would have to make a phone call [R. T. 39]. Appellant stated it would be $115 per kilogram [R. T. 44].

During the aforementioned phase of the transaction, appellant was weighing and selling marihuana to a person other than the informant [R. T. 35, 38].

Following the initial phase, the informant left and met with Agent Charles D. Casey [R. T. 23]. After obtaining some beer, the informant returned to the aforementioned address on St. Andrews [R. T. 23]. After the informant returned, appellant told him to wait there until he called, and then Penny would tell the informant where to go [R. T. 23, 43]. Approximately an hour later, Penny received a call from the appellant, and the informant was given a piece of paper with the address 1803 South St. Andrews appearing thereon [R. T. 23]. The informant then proceeded to the 1803 address with Sam, was waived in by the appellant, and they went into the kitchen [R. T. 25]. In the kitchen the appellant handed the informant the subject marihuana (Exhibit 1) [R. T. 25], and appellant was handed the agreed $230 [R. T. 26]. Following the transfer, appellant stated, "Hide them" [R. T. 48], and the informant was "rushed" out the back door [R. T. 26].

The marihuana sold by appellant was of Mexican origin [R. T. 13].

Agent Charles D. Casey, by the use of a receiver, overheard the conversations between appellant and the informant and, at the trial, corroborated the testimony of the informant [R. T. 64-68].

The appellant took the stand at trial and testified that he said, on December 2, 1965, that he would see if he could get some marihuana [R. T. 124]; that he called Penny from the 1803 address [R. T. 126-27]; that he was doing the informant "a favor" by giving him the "stuff" [R. T. 129].

V

ARGUMENT

A. THERE WAS NO OBJECTION TO NOR ERROR IN THE ADMISSIBILITY OF AGENT CASEY'S TESTIMONY REGARDING WHAT HE HEARD BY MEANS OF A TRANSMITTER WILLINGLY CONCEALED ON THE PERSON OF A PARTY TO A CONVERSATION.

Appellant makes no reference to the Reporter's Transcript wherein objection was made to Agent Casey's relation of conversation heard over a radio receiver. There, also, was no such objection made at the trial level. A point not raised in the trial court may not be raised on appeal. Osborne v. United States, 371 F. 2d 913 (9th Cir. 1967), cert. denied 387 U. S. 946; Bouchard v. United States, 344 F. 2d 872 (9th Cir. 1965).

Assuming arguendo, that the point had been preserved for appeal, the use of a Fargo did not violate either the Fourth, Fifth or Sixth Amendment rights of appellant. Garrett v. United States, 382 F. 2d 768 (9th Cir. 1967). The most recent word on the subject found by appellee appears in the concurring opinion of Justice White in Katz v. United States, ___ U. S. ___ (December 18, 1967). To quote Justice White:

> " . . . When one man speaks to another he takes all the risks ordinarily inherent in so doing including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates. Hoffa v. United States, supra. It is but a logical and reasonable extension of this principle that a man takes the risk that his bearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another . . . ."

B. SECTION 4742(a), TITLE 26, UNITED STATES CODE, IS NOT UNCONSTITUTIONAL AS A DEPRIVATION OF THE RIGHT NOT TO INCRIMINATE ONE'S SELF.

Appellant, relying on the recent decisions of Marchetti v. United States, ___ U. S. ___, 36 L. W. 4143 (January 29, 1968); and Haynes v. United States, ___ U. S. ___, 36 L. W. 4164 (January 29, 1968), urges that Section 4742(a) of Title 26 is unconstitutional.

Initially, since the three sentences are to run concurrently, affirmance of the judgment on either count one or two would not require the consideration of appellant's second point.

The instant statute is distinguishable from those at issue in Marchetti and Haynes. Section 4742(a) requires the obtaining of a form from the buyer of the marihuana, NOT FROM THE GOVERNMENT. Section 4742(a) does not require that a prospective or past seller inform the United States of anything.

VI

CONCLUSION

For the above stated reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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Chief, Criminal Division,

RONALD S. MORROW,
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Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Ronald S. Morrow
RONALD S. MORROW

No. 21227

In the United States Court of Appeals For the Ninth Circuit

KENNETH MCCLARTY,

Appellant,

vs.

STEWART L. UDALL,
Secretary of the Interior, et al,

Appellees.

Supplemental (Reply) Brief of Appellant

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

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Appellees.

Supplemental (Reply) Brief of Appellant

This brief is submitted pursuant to order of the court filed in this cause November 26, 1968, and strictly in response to the citation to *United States v. U. S. Minerals Development Corporation*, 75 I.D. 127 (April 30, 1968) furnished to the Clerk of the Court of Appeals for the Ninth Circuit for insertion in the Government's brief by Mr. Marquis of counsel for appellees. (See Addendum "A") It is the position of appellant that this supplemental brief, is in the nature of a brief in reply to the appellees' answering brief.

This brief has been made necessary because in the *U. S. Minerals Development Corporation* opinion the Department of the Interior has set forth an extended discussion of this case and has also articulated for the first time a new formula for determination of "uncommon varieties" under 30 U.S.C. § 611.

DISCUSSION OF McCLARTY V. UDALL IN THE U. S. MINERALS OPINION

Discussing the *McClarty* case in *United States v. U. S. Minerals Development Corporation, supra,* the Department of the Interior recognizes that most of the stone from the Snoqueen deposit was regular in size and shape, did not require as much cutting or shaping and that the deposit had an economic advantage over other deposits because of this concentration of naturally fractured, regularly shaped stone. (75 I.D. at 131, 132, 133). It was also recognized that this was a unique characteristic of the deposit. (75 I.D. at 133). The appellant has no argument with the Department's view of the facts on these points. However, other contentions which cannot be supported are made as to the facts of the *McClarty* case.

The opinion states that the naturally fractured stone in the Snoqueen deposit is not distinguishable from stone found in other deposits in the area. (75 I.D. at 131). It is obvious that this statement disregards the property of the Snoqueen deposit which is the principal source of its value as building stone and is conceded to be a unique characteristic, namely, the predominant fracturing or jointing which produces long narrow slabs of stone with faces intersecting at nearly right angles. (A. Tr. 54-56, 62, 81, 137, 140, 141, A. Ex. "A" —Ritchie letter). This is also apparent from other contentions made in the opinion to the effect that no

special value because of this fracturing had been recognized in actual usage (75 I.D. at 132), that there was no evidence that in use of the stone in the building trade any significant value had been attributed to it because of this jointing (75 I.D. at 133), and that this characteristic did not give distinct and special value because a purchaser would not pay any more for it than for a stone which had to be cut to shape and that it would make no difference to a purchaser how the shape of the stone was achieved, whether by natural fracturing or fabrication. (75 I.D. at 133). The weakness of these contentions, besides their patent absurdity is, of course, that they are not supported by substantial evidence and that the only competent evidence on the point is to the contrary.

The uncontradicted evidence is that stone from the Snoqueen deposit is faster, easier and more economical to use (A. Tr. 122-123, 126-127). The difference between the market value of Snoqueen stone and common stone (A. Tr. 104) is also uncontradicted. To state that a purchaser will not pay more for regularly and desirably fractured stone than for stone which has to be cut to shape and that such a purchaser will be indifferent to whether the shape of a stone has to be achieved by natural fracturing or fabrication is not only unsupported in the record and contrary to the evidence but defies common sense. Obviously, if cutting and shaping must be done by the purchaser, then such stone will be less valuable to him than stone which does

not require cutting and shaping. On the other hand, if cutting and shaping is done by the seller rather than the purchaser, the expense of that processing may be a matter of indifference to the purchaser, but obviously the desirable fracturing would then have considerable value to the seller even though it might not be reflected by a market price higher than that for manufactured or processed material.

THE NEW FORMULA OF THE U. S. MINERALS OPINION

In recognition of the holding of *United States v. Coleman*, No. 630, 390 U.S. 599, 88 Sup. Ct. 1327 (April 22, 1968), the Department of the Interior in *United States v. U. S. Minerals Development Corporation, supra*, held that the 1955 Amendments to the Materials Act removed "common varieties" of building stone from the coverage of the mining laws, but left building stone that has "some property giving it a distinct and special value" still subject to location under the mining laws. (75 I.D. at 130). In fact the Supreme Court left 30 U.S.C. § 161 entirely effective as to such building stone. The Supreme Court opinion in the *Coleman* case is, of course, not definitive as to what properties a building stone deposit must have to remove it from the class of "common variety" materials. In *Coleman* the facts were significantly different and the deposits involved were of stone identical to that found in immense quantities in the area outside the claim.

Consequently, the attempt of the Department of the Interior in the *U. S. Minerals* case to establish a test to determine whether or not a deposit is of a "common variety" stone requires closest scrutiny. Before examining the criteria which the Department of the Interior attempts to establish in that opinion, it is essential to examine the legislative history of 30 U.S.C. § 611.

LEGISLATIVE HISTORY

Sec. 611 of 30 U.S.C. (§ 3 of the Act of July 23, 1955, 69 Stat. 368) in bill form was § 3 of H.R. 5891. This bill was reported in House Report 730, 2 U. S. Code Congressional & Administrative News, p. 2474. The report indicates that abuses of the mining laws by persons locating claims for other than bona fide mining activities was a prime concern of Congress in enacting this legislation. This is revealed in the following passages from the report:

> "The Committees on Interior and Insular Affairs of both the House and Senate have in the past several years been made increasingly aware of the abuses under the general mining laws by those persons who locate mining claims on public lands for purposes other than that of legitimate mining activity." U. S. Code Congressional & Administrative News, Vol. 2, 84th Congress, 1st Session, 1955, page 2478.
>
> "There is, however, agreement that any corrective legislation providing for multiple use of the surface of the same tracts of public lands, compatible with unhampered subsurface resource development, must be aimed at—
>
> "First, prohibiting location of mining claims

> for any purpose other than prospecting, mining, processing and related activities;
>
> "Second, providing for conservation and utilization of timber, forage, and other surface resources on mining claims, and on adjacent lands; and
>
> "Third, accomplishing these desirable ends without materially changing the basic concepts and principles of the general mining laws.
>
> "H.R. 5891 is, in the view of the Committee on Interior and Insular Affairs, responsive to the need for corrective action outlined." *Id.* 2480.

It is apparent then that the intent of Congress was to prohibit locations of sand, gravel and stone only insofar as necessary to prohibit location of claims for other than legitimate mining activities while at the same time avoiding a material change in the basic concepts and principles of the mining law, which laws would, of course, include 30 U.S.C. § 161, the building stone statute. This legislative history makes it clear that while a common variety of stone which is no different than any other stone found in the area is not removed from the "common varieties" classification simply because it is capable of being used as building stone, where a deposit of stone has some property not generally found which makes that deposit valuable as building stone and suitable for bona fide mining operations, then that deposit should be subject to location under the mining laws just as before.

THE NEW FORMULA

It is in the light of this legislative history that the rule formulated by the Department of the Interior in *United States v. U. S. Minerals Development Corporation, supra,* must be considered. The two basic criteria which must be shown for sand, stone or gravel to be classified as an "uncommon variety", are stated to be as follows:

1. It must have a unique property.

2. The unique property must give the deposit a distinct and special value. (75 I.D. at 134).

"Unique" Property v. "Some" Property

The requirement of a "unique property" is improper, particularly in view of the language of 30 U.S.C. § 611 which requires only that "some property" give a deposit distinct and special value. There is no justification in the literal language of the statute nor in the purposes for which it was enacted for this extreme narrowing of the concept of the type of property which a deposit must have to escape classification as a "common variety." However, even if the "unique property" criterion were applied in the instant case, it would not preclude upholding location of the Snoqueen deposit in view of the concession in the *U. S. Minerals* opinion that the concentration of natural fracturing found in Snoqueen was a unique characteristic of the deposit. (75 I.D. at 133).

A Distinct and Special Value—Uncommon Uses

The second criterion as to distinct and special value is viewed as establishing a requirement for a causal relationship between the property in question and the value of the deposit. This relationship, according to the *U. S. Minerals* opinion may be established by showing that the deposit has value for some use to which common varieties of the mineral in question cannot be put. Stone from the Snoqueen deposit has in fact been used in a unique way by putting together irregular shapes which are both flat and vertical. (A. Tr. 188). Consequently, it is submitted that the record establishes the necessary relationship between the particular property of the deposit and its value even under this new test.

Distinct and Special Value — Common Uses

Under the new formula where the mineral is put only to the same uses as common varieties, the deposit in question is to be compared with other deposits of such minerals. (75 I.D. at 132). This, presumably, would require a comparison of the Snoqueen deposit with other andesite deposits in the White Pass area. However, the Department has imposed on this requirement the further restriction that the only evidence on which such a comparison can be based is a market price differential between the deposit in question and other deposits which lack the property or properties alleged to give the deposit distinct and special value. (75 I.D. at 134, 135). This additional requirement is improper because it

affords an inadequate basis for comparison and improperly restricts the means of proof.

The basis for comparison is incomplete and misleading. If the intent of Congress is to be reflected properly, the price differential would have to be between the market price for stone from the deposit in question and stone from other deposits which lack not only the property alleged to give value to the deposit in question but any property giving them distinctive special value. Of perhaps more immediate importance is the refusal of the Department of the Interior under this formula to acknowledge the probative value of any evidence other than market value. That approach eliminates from consideration value which is due to ease of extraction and handling of material before it reaches the market. It also disregards other types of evidence which are obviously indicative of value, such as the fact that as here stone may be faster, easier and more economical to lay. (A. Tr. 122-123, 126-127).

It is not conceded that it is proper in any circumstances to limit proof of distinct and special value exclusively to evidence of a differential in market price. However, if such a requirement is imposed, there is nevertheless support in the record in this case for the position that evidence satisfying that requirement was submitted. Before the hearing examiner, Kenneth McClarty testified that a price of $40.00 to $45.00 per ton for stone from the Snoqueen deposit was readily accepted, but that common rock could be purchased at

from $6.00 to $7.00 maximum per ton. (A. Tr. 104). This testimony is not as explicit or detailed as might, with hindsight, be desired. Nevertheless, viewed in context it should be recognized as evidence of a comparison between the market price for building stone and the market price for common stone marketed for building purposes. The witness was shown to be engaged in lumber manufacture, the sale of building materials and home construction. (A. Tr. 96, 111). His testimony as to market prices appeared in the context of a discussion of the development and use of stone from the Snoqueen deposit as a building stone. The contestants did not by either cross examination or affirmative evidence attempt to refute the logical inference that both prices referred to sales of stone for building purposes. The use of the term "rock" by the witness does not warrant any inference that something other than common stone usable for building purposes was referred to inasmuch as the words "rock" and "stone" are virtually interchangeable, particularly where used in a colloquial sense. (See Addendum "B").

The Department of Interior's exclusive reliance upon the market value criterion is, of course, something which was not taken into consideration in this case by either the hearing examiner or the office of the Secretary of the Interior. The case certainly appears not to have been tried on such a theory before the hearing examiner in view of the obvious failure to fully develop the evidence which did come in relating to these points.

Further, even the Department of the Interior concedes that language used in its previous departmental decisions going as far back as *United States v. J. R. Henderson*, 68 I.D. 26 (1961) would lead one to conclude that any mineral deposit used for the same purposes as deposits of admittedly common varieties would be held to be a common variety. (75 I.D. at 133). In view of this it would seem that inasmuch as the new formula was stated apparently for the first time in April of 1968, if proof must be made strictly in terms of market value, then the claimant should be afforded an opportunity to provide such proof.

CONCLUSIONS

Although in its discussion of the *McClarty* case in the *U. S. Minerals* opinion, the Department of the Interior concedes that the Snoqueen deposit has unique characteristics which give it an economic advantage, it persists in its contentions that the stone from the deposit is identical to other stone in the area and that the deposit has no special value. These contentions are unsupported by the record, without common sense, and contrary to the competent evidence in the record.

The new formula expressed by the Department of the Interior in the *U. S. Minerals* case is contrary to the intent of Congress as expressed in 30 U.S.C. § 611 and the legislative history of that statute. The formula goes too far beyond the purpose of Congress which was to prevent abuses of the mining laws without materially

changing the basic concepts of those laws. The requirements of the formula that a deposit have a "unique" property and that stone from it either be put to uncommon uses or have value for common uses demonstrated exclusively in terms of a market price differential is unwarranted. The definition of the requisite market price differential improperly requires comparison with other deposits which may have different properties of their own giving them "distinct and special value."

Assuming without the conceding the propriety of these new requirements, the Snoqueen deposit, on the present record, should be found subject to location under the mining laws because of it unique nature, the unique uses to which stone from it has been put and the demonstration of its value in use by the testimony of the stonemason. Finally, the testimony viewed in context shows that even the market price differential required by the new formula exists.

Should the Court hold that a market price differential must be shown here and that the record is not developed sufficiently on that point, then the case should be remanded to take further evidence as to market price differentials in accordance with criteria which the Court holds to be consistent with the intent of 30

U.S.C. § 611 in light of the language of that statute, its legislative history and the continued existence of the building stone statute 30 U.S.C. § 161.

Respectfully submitted,
DONALD H. BOND
of HALVERSON, APPLEGATE
& MCDONALD
Attorneys for Appellant

CERTIFICATE

I certify that, in accordance with the preparation of this brief, I have examined Rules 28 and 32 of the Federal Rules of Appellant Procedure, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DONALD H. BOND

ADDENDUM "A"

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D.C. 20530

November 6, 1968

SEAL
Address Reply to the
Division Indicated
and Refer to Initials
and Number

RPM
90-1-4-125

AIR MAIL

Donald H. Bond, Esquire
Halverson, Applegate, McDonald & Weeks
343 East "D" Street
Post Office Box 526
Yakima, Washington 98901

Dear Mr. Bond:

Re: No. 21227 — Kenneth McClarty v. Udall

For your information, the following citation of authority has been furnished to the Clerk of the Court of Appeals for the Ninth Circuit for insertion in the Government's brief in the above-entitled case:

United States v. U. S. Minerals Development Corp., 75 I.D. 127 (Apr. 30, 1968).

Clyde O. Martz
Assistant Attorney General
Land and Natural Resources Division

By:
Roger P. Marquis
Chief, Appellate Section

ADDENDUM "B"

Webster's New Twentieth Century Dictionary,
Unabridged, (2d Ed.)
Page 1568

rock, *n.*[*OFr. roche;* cf.A.S.-*rocc*, ML.*rocca.*]

1. a large mass of stone forming a peak or cliff.

2. (a) stone in the mass; (b) broken pieces of such stone.

3. (a) mineral matter variously composed, formed in masses or large quantities in the earth's crust by the action of heat, water, etc.; (b) a particular kind or mass of this.

4. anything like or suggesting a rock, as in strength or stability; especially, a firm support, basis, refuge, etc.

5. any cause of wreck or destruction; as, the *rock* upon which one breaks: in allusion to a ship.

6. a kind of hard, insoluble, soapy compound formed by the action of lime on fats.

7. the rockfish.

8. the rock dove.

9. a type of hard candy. [Chiefly Brit.]

10. a stone, whether large or small. [Colloq. or Dial.]

11. (a) [*usually in pl.*] a piece of money; as, a pocket full of *rocks;* (b) a diamond or other gem. [Slang.]

on the rocks; (a) out of money; (b) in or into a condition of ruin or catastrophe. [Colloq.]

Page 1793

stone, *n.* [ME. *ston, stoon;* AS. *stan,* stone; akin to D. *steen;* Ice. *steinn;* Dan. and Sw. *sten;* G. *stein;* Goth. *stains;* the base *sti* also appears in Russ. *stiena,* a wall, and Gr. *stia,* a stone, pebble.]

1. the hard, solid, nonmetallic mineral matter of which rock is composed.

2. a piece of rock of relatively small size.

3. a piece of rock shaped or finished for some purpose; specifically, (a) a building block; (b) a paving block; (c) a gravestone or memorial; (d) a boundary mark or milestone; (e) a grindstone or whetstone.

4. something that resembles a small stone; specifically, (a) a hailstone; (b) a testicle; (c) a stonelike seed of certain fruits; specifically, the hard endocarp of a drupe, as of the peach; (d) [Obs.] a gunflint.

5. a precious stone or gem.

6. *pl.* **stone,** in Great Britain, 14 pounds avoirdupois.

7. in medicine, (a) a small stony mass abnormally formed in the kidney, bladder, or gall bladder; calculus; (b) a disease characterized by such formations.

8. in printing, a table with a smooth top, originally of stone, on which page forms are composed.

Arkansas stone; a fine-grained stone used for making hones; novaculite.

Caen stone; a kind of cream-colored limestone used for building; so-called because found near Caen, France.

meteoric stones; meteorites.

to cast the first stone; to be the first to censure, criticize, or attack.

to leave no stone unturned; to do everything that can be done.

21229

No. [redacted]

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SUE H. HALL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED
AUG 15 1966
WM. B. LUCK, CLERK

OPENING BRIEF OF APPELLANT

Appeal From The United States District Court
For The Southern District Of California
Central Division

FILED
AUG 23 1966
WM. B. LUCK, CLERK

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NOV 4 1966

No. M 2833

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SUE H. HALL,

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UNITED STATES OF AMERICA,

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No. M 2833

IN THE

UNITED STATES CCURT OF APPEALS

FOR THE NINTH CIRCUIT

SUE H. HALL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF OF APPELLANT

FACTS

This is an action filed by appellant in the United States District Court for the Southern District of California, Central Division, Case No. 64-1363-TC, pursuant to the provisions of the Federal Tort Claims Act, 28 U.S.C. Section 1346(b), and Sections 2671 et. seq. The action was filed in the above-mentioned court on or about October 5, 1964, for personal injuries sustained by the appellant in a motor vehicle accident near Barstow, California, which occurred on November 24, 1963.

The appellee filed an answer to the complaint on or about December 11, 1964, alleging among other things as an affirmative defense that the trial court had no jurisdiction in that the action was barred by provisions of the Federal Employee's Compensation Act as set forth in 5 U.S.C. Section 757(b). On or about August 5, 1965, the appellee moved the trial court to dismiss the appellant's complaint on the ground that the trial court lacked jurisdiction over the subject matter of plaintiff's claim, alleging that the provisions of the Federal Employee's Compensation Act was the exclusive remedy for the appellant. The trial court made its order granting the appellee's motion to dismiss which was entered in the docket on August 23, 1965. The appellant appeals from the order of the trial court granting the dismissal.

The pertinent facts as illustrated by the pleadings and appellant's Affidavit submitted with her Memorandum of Points and Authorities in opposition to the motion to dismiss made in the trial court are that appellant was employed as a nurse at Fort Irwin, California, from on or about February 21, 1962, to November 24, 1963. The appellant's hours of employment at the time of the accident were from 12:00 o'clock midnight to approximately 7:30 in the morning, commonly referred to as the graveyard shift. At the time of the accident the appellant resided in Lenwood, California, which is approximately 40 miles from her place of employment at Fort Irwin, California. Barstow, California, is approximately 35 miles from Fort Irwin.

During the time Mrs. Hall, the appellant herein, was employed as above indicated, she oftentimes rode to work on a bus owned and operated by the United States Army. She would board the bus at the Greyhound Bus Terminal in Barstow and ride to work. Upon the completion of her work shift, she would board the bus at Fort Irwin and return to the Greyhound Depot in Barstow.

The accident in question occurred as above indicated on November 24, 1963, at approximately 10:36 P.M. The accident occurred while on the way to work and on the outskirts of Barstow, California, when the bus was still over 30 miles from Mrs. Hall's place of employment at Fort Irwin. Mrs. Hall alleged in her complaint under provisions of the Federal Tort Claims Act that the bus was operated negligently, and that the United States of America was responsible to respond to her in damages for personal injuries sustained by her. As of the date of filing the complaint, Mrs. Hall alleged that she had incurred medical expenses as a result of the accident in the sum of $1,076.86 and lost wages in the sum of $4,475.00. She further alleged that she would incur damages in the future for medical treatment and additional lost wages, and prayed for leave to amend her complaint at the time of trial to include such sums as proved by the evidence. As of August 13, 1965, Mrs. Hall was still incapable of returning to work. Mrs. Hall alleged serious permanent disability and prayed for $350,000.00 as and for general damages.

The United States Army Bus that Mrs. Hall rode upon in getting to and from work, including the night during which the accident in question happened, was one used for the transportation of anyone who wished to use it. Primarily it was occupied by military people and civilian employees; however, the system was operated as a public conveyance, and the transportation was available to anyone who wished to use it. During the time Mrs. Hall used the facilities of the transportation system involved there was a 25¢ charge for all persons who rode on the bus that left Barstow to Fort Irwin at 6:15 A.M., and the bus which left Fort Irwin to Barstow at 4:30 P.M. The buses that ran at night, however, were provided free to anyone who wished to use them. Mrs. Hall never paid for a trip to Fort Irwin at night or returning from Fort Irwin in the morning; nor had she ever observed anyone else ever pay. She had no special pass to ride the bus, nor did anyone else to her knowledge. The transportation was not supplied as a condition of her employment, and she was welcome to use the bus or not as she wished.

The accident in question occurred on publicly owned and maintained highways in the vicinity of Barstow, and not aboard or within the confines of the Fort Irwin military reservation where Mrs. Hall was employed.

Following the accident Mrs. Hall contacted the Personnel Officer at Fort Irwin to inquire whether she was covered by the provisions of the Federal Employee's Compensation Act. At that

time she was informed that she probably was, and that she could receive benefits from the Act as soon as she had used up her sick and annual leave. On or about February 11, 1964, she again contacted the Personnel Office, at which time she was instructed that the Personnel Office had checked the matter further with the office at San Francisco, California, and had found that Mrs. Hall was not covered under the Federal Employee's Compensation Act and that she was not eligible for any benefits under that Act. It was following this that Mrs. Hall obtained counsel to prosecute her claim pursuant to the provisions of the Federal Tort Claims Act against the United States of America.

Apart from the allegations of negligence, the above facts were not controverted in the pleadings, nor were there any affidavits filed in opposition regarding the appellee's motion to dismiss.

Since the order granting appellant's motion to dismiss made in the trial court, appellant has submitted a claim pursuant to the provisions of the Federal Employee's Compensation Act in order to preserve her rights. To the date of filing this brief, neither appellant nor her counsel have been informed of the acceptance or rejection of appellant's claim from the Bureau of Employee's Compensation.

ISSUES AND LAW

The only issue involved in this appeal is whether or not the provisions of the Federal Employee's Compensation Act bar the appellant from proceeding with her lawsuit pursuant to the rules of the Federal Tort Claims Act.

The Federal Employee's Compensation Act provides in 5 U.S.C. Section 751(a):

> "The United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from personal injuries sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by the wilful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or another, or if intoxication of the injured employee is the proximate cause of the injury or death."

5 U.S.C. Section 757 provides:

> "The liability of the United States or any of its instrumentalities . . . shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee . . . on account of such injury or death . . .

under any Federal Tort liability statute."

Appellant concedes that if she is entitled to benefits of the Federal Employee's Compensation Act, that that remedy is exclusive as provided by law, and she has no right to proceed against the appellee under the Federal Tort Claims Act. Pursuant to 5 U.S.C. Section 751(a), an injured party is entitled to the benefits of the Federal Employee's Compensation Act if the injury is sustained while in the performance of his duty. Some of the cases seem to go a little further and say that an employee is entitled to the benefits of the act if injury is sustained within the scope of his duty or employment.

It has long been recognized in all jurisdictions known to appellant under either state or federal law that employees are not covered by any workmen's compensation or employee's compensation law if and when they are injured while going to or coming from work. The only situations where this general rule has not been followed in the federal courts applying the provisions of the Federal Employee's Compensation Act are those cases where the injury occurred while the claimant was going to or leaving work in private transportation, but at a time when still within the confines of the military establishment, where the claimant had applied for and received some benefits pursuant to the provisions of the Federal Employee's Compensation Act, or when the injury occurred to the claimant at a time that the claimant was being paid for his time, even though he may have

been temporarily away from his place of employment. Stiffler v. U.S., 122 Fed.Supp. 304; Etheridge v. U.S., 177 Fed.Supp. 734; Biagi v. U.S., 115 Fed.Supp. 697; Daniels-Lumley v. U.S., 306 Fed.2d 769. Mrs. Hall falls in neither of these categories in that the accident in question occurred over 30 miles from her place of employment and the military reservation where she worked, she was not being paid for her time in wages or a salary or in any other fashion at the time of the accident, the transportation was not supplied to her as an incident of her employment, and she has not received, nor prior to the filing of her lawsuit applied for any benefits under the Federal Employee's Compensation Act. In regard to the latter, appellant points out as hereinabove alleged that Mrs. Hall was expressly instructed that the provisions of the Federal Employee's Compensation Act did not apply to her case, and further that she was not entitled to any benefits under the act by the personnel in charge of making such claims at the Personnel Office at Fort Irwin, California. The fact that appellee, although knowing of appellant's injury, and although allowing her sick leave time and annual leave time while she was suffering from the injuries sustained, informed the appellant that she had no right to compensation can itself be considered consistent only with appellee itself having no intention or belief that Mrs. Hall was injured in the performance of her duty so as to bring the injury under 5 U.S.C. Section 751(a). Appellant has only applied for

the benefits of the Federal Employee's Compensation Act to preserve her rights since the trial court granted the appellee's motion to dismiss the appellant's complaint.

The only federal case found by your appellant where the facts were consistent with the facts as presented by the appellant herein is Desousa v. Panama Canal Co., 202 Fed.Supp. 22. In the Desousa case, a government employee sustained personal injuries while a passenger aboard a trian owned and operated by the same governmental instrumentality by which he was employed. The case pointed out there was no distinction to be made between being employed by the government or government corporation or agency. Plaintiff filed suit against defendant pursuant to provisions of the Federal Tort Claims Act. The defendant contended that since the plaintiff was on his way to work when the accident happened, since the transportation involved was owned by the same agency for whom he was employed, and since plaintiff was entitled to special rates for the transportation on the train by reason of his employment, that the exclusive jurisdiction of the matter was through the applicable provisions of the Federal Employee's Compensation Act, and that the Federal District Court where the matter was filed had no jurisdiction. The plaintiff admitted that he was employed by the same governmental agency who owned and operated the railroad, and that he was injured in a train accident while on the way to work. The plaintiff denied that he received any special rates for his train

transportation, and alleged that the rate he paid was simply the regular rate for second-class fair available at the same price to persons who were not company employees. The defendant's motion for summary judgment was denied. The court did recognize that if the plaintiff sustained his injuries while "in the performance of his duty" as an employee of the defendant within the meaning of the Federal Employee's Compensation Act, his exclusive remedy would have been under said Act and he could not recover under the Federal Tort Claims Act. The crucial issue on the defendant's motion to dismiss in Desousa was whether or not the undisputed fact that the plaintiff was an employee of the defendant and traveling to work on the employer's railroad in and of itself necessarily showed that he was "in the performance of his duty" within the meaning of the Federal Employee's Compensation Act. The court held that an employee is not necessarily engaged "in the performance of his duties" merely by the fact that he is traveling to work on a public transportation system operated by the employer without any special arrangements with his employer, either express or implied. The court pointed out that the fact that the plaintiff traveled on the defendant's railroad may have been a mere coincidence arising out of the fact that defendant owned and operated the only available means of transportation; the court further pointed out that this was not sufficient to establish that the commuting employee was "in the performance of his duty" while engaged in

such travel. This language is particularly applicable to the appellant herein in that the bus operated by the United States Army to Fort Irwin, California, was the only transportation available to the public to travel to Fort Irwin and back to Barstow.

The Desousa case also held that the federal law must be applied in interpreting federal statute in that the court was not bound by local decisions or standards. Based on this authority, the federal decisions on the point are controlling.

The next question is what procedure should be utilized to determine the applicability of the provisions of the Federal Employee's Compensation Act. This court is entitled to rule that the Federal Employee's Compensation Act is not applicable to this factual situation and proceed with the trial of this case. Desousa v. Panama Canal Company, 202 Fed.Supp. 22 (S.D. NY. 1962), Messig v. United States, 129 Fed.Supp. 571 (D. Minn. 1955), and United States v. Martinez, 334 Fed.2d 728.

In Somma v. United States, 283 Fed.2d 149 (Court of Appeals, Third Circuit, 1960), the plaintiff who was appealing from a judgment against him in the lower court asked the Court of Appeals to pass on the question of coverage under the Federal Employee's Compensation Act. The Circuit Court of Appeals held that it was proper to have the coverage of the Federal Employee's Compensation Act determined first by the administrative body provided for by the Act before the merits of

the plaintiff's claim under the Federal Tort Claims Act were passed upon. In this case the court said as follows:

> "In so deciding, we are not abdicating the functions and responsibility of the court in favor of an administrative agency; rather, we are merely carrying out the obvious intent of Congress when it created the F.E.C.A. The Act sets up a comprehensive system of workmen's compensation for Federal employees. Congress provided that it be interpreted and administered by a Bureau of Employees Compensation and an Appeals Board whose action is not reviewable by the courts. (Citations) Obviously, the purpose in so providing was to insure uniformity of interpretation in policy. Where, as here, admittedly a substantial question of coverage exists, especially in an area in which the board has not as yet authoritatively spoken, we think it extremely important that it have the opportunity to speak first."

DISCUSSION

Appellant submits that Desousa v. Panama Canal Co., 202 Fed. Supp. 22 (S.D. NY. 1962) is the controlling authority in the present appeal. Based upon this authority, the trial court below should not have granted the appellee's motion to dismiss the appellant's complaint. There are triable issues of fact. In addition, and pursuant to the holding as expressed in Somma v. United States, 283 Fed. 2d 149 (Court of Appeals, Third Circuit, 1960), the court should have at least stayed proceedings allowing appellant ample time to submit a claim for acceptance or rejection by the Bureau of Employee's Compensation. If this Honorable Court allows the order granting the dismissal by the trial court to stand, the end result could be a complete denial of any recovery whatsoever to the appellant, Mrs. Hall. This is true by reason of the fact that the Bureau of Employee's Compensation may decide to reject the appellant's claim. If this were to happen and the order of dismissal made in the lower court were allowed to stand, the appellant could not thereafter pursue her rights under the Federal Tort Claims Act in that the statute of limitations will have expired on her claim. It is respectfully submitted that this honorable court remand the appellant's case back to the trial court with instructions that the matter proceed to trial on all issues, including the issue of whether or not the plaintiff's claim is barred by the exclusive

provisions of the Federal Employee's Compensation Act, or in the alternative that the trial court be instructed to stay proceedings on the appellant's case until such time as the appellant is notified of the acceptance or rejection of her pending claim for the benefits of the Federal Employee's Compensation Act.

Respectfully Submitted,

/s/ Edward L. Heap

EDWARD L. HEAP

Attorney for Sue H. Hall,
Appellant.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Edward L. Heap
EDWARD L. HEAP

No. 21229

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUE H. HALL,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF AND APPENDIX FOR THE APPELLEE

FILED

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UNITED STATES OF AMERICA,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF AND APPENDIX FOR THE APPELLEE

JURISDICTIONAL STATEMENT

Plaintiff brought this action, in the United States District Court for the Southern District of California, seeking damages from the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 et seq. The district court granted the Government's motion to dismiss for lack of jurisdiction on the ground that plaintiff's exclusive remedy was under the Federal Employees' Compensation Act, 5 U.S.C. 751 et seq. (hereinafter referred to as FECA). The jurisdiction of this Court to hear the present appeal from that dismissal is based on 28 U.S.C. 1291.

FACTS

In her complaint in this Federal Tort Claims Act action, plaintiff, a civilian employee of the Army on her way to work, alleged that she was injured when the Army bus in which she was then riding collided with a tractor-trailer. Alleging further that the accident was caused by the negligence of the driver of the Army bus, she sought approximately $355,000 in damages.

In its answer, the Government raised the affirmative defense that the district court had no jurisdiction since the action was barred by the FECA. The Government also moved to dismiss, or in the alternative for summary judgment, on the ground of lack of jurisdiction.

In opposition to the Government's motion, appellant submitted an affidavit to the district court. Her affidavit admitted that she was employed as a nurse at Fort Irwin, California, and that "the accident occurred while on the way to work" in the Army bus. She resided in Barstow, California, which is approximately 35 miles away from Fort Irwin. She frequently rode to and from work on a bus owned and operated by the United States Army; however, there was no requirement that she must ride the bus. The bus was available to anyone who wished to use it, although it was primarily used by military and civilian employees of Fort Irwin. On the morning bus which left Barstow at 6:15 a.m. for Fort Irwin and on the afternoon bus

which left Fort Irwin at 4:30 p.m. for Barstow, a 25 cent fee was charged. On the night-time runs, on which Mrs. Hall rode since she worked the night shift, no fee was ever charged. On November 24, 1963, Mrs. Hall boarded the bus for Fort Irwin at Barstow. At approximately 10:36 p.m. on the public highway 30 miles from Fort Irwin, the bus was involved in an accident, causing the injuries which led to the filing by Mrs. Hall of the present Federal Tort Claims Act suit against the United States.

On August 23, 1965, the district court granted the Government's motion to dismiss the complaint for lack of jurisdiction. From this order of dismissal appellant noted an appeal on October 21, 1965. Thereafter, appellant on May 27, 1966, filed an application with the U.S. Department of Labor for administrative compensation under the FECA. That application is currently pending.

STATUTE INVOLVED

5 U.S.C. 751(a) and 757(b) of the Federal Employees' Compensation Act provide as follows:

5 U.S.C. 751(a):

> (a) The United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by willful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another, or if intoxication of the injured employee is the proximate cause of the injury or death.

5 U.S.C. 757(b):

> (b) The liability of the United States or any of its instrumentalities under sections 751--756, 757--781, 783--791 and 793 of this title or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute: Provided, however, That this subsection shall not apply to a master or a member of the crew of any vessel.

QUESTION PRESENTED

Whether the district court properly dismissed plaintiff's complaint under the Federal Tort Claims Act in view of the fact that the Federal Employees' Compensation Act provides the exclusive remedy against the United States for a federal employee injured while in the performance of his duties.

SUMMARY OF ARGUMENT

The Federal Employees' Compensation Act is the exclusive remedy of an employee of the United States injured "while in the performance of his duty". Mrs. Hall clearly was injured "while in the performance of her duty" within the meaning of the FECA, the workmen's compensation act for federal employees. It is settled by uniform judicial decisions that an employee is deemed to be acting within the course or performance of his

duties if he is injured while riding to work in a vehicle under the control of the employer, or where there is an implied contract that the employer furnish transportation. Here, the United States, as employer, did furnish a vehicle under its control to transport Mrs. Hall to work, and there was an implied contract that it furnish transportation. Moreover, FECA coverage of the present case is confirmed by the administrative award of benefits under the FECA to the estate of Jewel Young, a co-employee of Mrs. Hall at Fort Irwin, who was killed riding to work on the same Army bus in the same accident which caused Mrs. Hall's injuries. Since FECA coverage thus existed here, the district court properly held that it had no jurisdiction to entertain Mrs. Hall's tort action. Furthermore, this being a case where FECA coverage is clear, no purpose would be served by this court granting appellant a stay so as to enable the administrative agency to make the primary determination of coverage.

ARGUMENT

I. SINCE APPELLANT'S INJURIES, INCURRED GOING TO WORK ON A BUS PROVIDED BY HER EMPLOYER, WERE SUSTAINED "WHILE IN THE PERFORMANCE OF HER DUTY", HER FEDERAL TORT CLAIMS ACT SUIT IS BARRED BY THE FECA.

A. The exclusive remedy for a federal employee injured while in the performance of her duty is that provided for by the FECA. The Federal Employees' Compensation Act, 5 U.S.C. 751 et seq., establishes a specialized and comprehensive compensation scheme for a federal government employee who sustains

a personal injury "while in the performance of his duty." Where an injury to a federal employee is within the coverage of the FECA, no action based upon that injury may be maintained under the Federal Tort Claims Act or under any other federal tort liability statute. The FECA remedy is exclusive. E.g., Johansen v. United States, 343 U.S. 427 (1952); Patterson v. United States, 359 U.S. 495 (1959); Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597, 601 (1963); Thol v. United States, 218 F. 2d 12 (C.A. 9, 1954); Posegate v. United States, 288 F. 2d 11 (C.A. 9, 1961), certiorari denied, 368 U.S. 832; Soderman v. United States, 313 F. 2d 694 (C.A. 9, 1963), certiorari denied 372 U.S. 968; Gunston v. United States, 235 F. Supp. 349, aff'd 358 F. 2d 303 (C.A. 9, 1966). The critical question therefore is whether Mrs. Hall's injuries come within the coverage of the FECA; that is, whether her injuries were sustained "while in the performance of her duty."

B. Appellant's injuries were sustained "while in the performance of her duty". A long line of judicial decisions make it clear that Mrs. Hall was acting "while in the performance of her duty". "While in the performance of her duty" is, of course, synonymous with the phrase in the typical workmen's compensation statute, "arising out of and in the course of employment".[1/] The general rule in workmen's compensation law

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1/ The U.S. Department of Labor has consistently held that "while in the performance of his duty" in the FECA is synonymous with "arising out of and in the course of employment". See, e.g., In the Matter of Bernard D. Blum, 1 E.C.A.B. 1, 2 (1947); In the Matter of Harold Vandiver, 4 E.C.A.B. 195, 196 (1951); In the Matter of Lillie J. Wiley, 6 E.C.A.B. 500, 502 (1954); In the Matter of Helen K. Mickler, 15 E.C.A.B. 392 (1964).

is that "if the trip to and from work is made in a truck, bus, car or other vehicle under the control of the employer, an injury during that trip is incurred in the course of employment" for workmen's compensation benefit purposes. 1 Larson, Workmen's Compensation 279 (sec. 17.10)(1965 ed.). E.g., Liberty Mutual Insurance Co. v. Gray, 137 F. 2d 926 (C.A. 9, 1963); Peski v. Todd & Brown, Inc., 158 F. 2d 59 (C.A. 7, 1946); Shreve v. Hot Shoppes, Inc., 184 F. Supp. 436 (D.D.C., 1960), aff'd 292 F. 2d 761 (C.A.D.C., 1961); Guarantee Ins. Co. v. Industrial Acc. Comm'n, 97 Cal. App. 2d 46, 217 P. 2d 51 (1950); Harlan v. Industrial Acc. Comm'n, 194 Cal. 352, 228 Pac. 654 (1924).

In Liberty Mutual Insurance Co. v. Gray, 137 F. 2d 926 (C.A. 9, 1943), an employee was returning to his work site, after a day off, in a truck hired by his employer for the purpose of transporting his employees to the work site without charge. The truck was involved in an accident, and the employee was injured. In an action under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, et seq., closely analagous to the FECA,[2/] this court held that the employee could recover. The

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2/ The Longshoremen's and Harbor Workers' Compensation Act authorizes compensation benefits if the employee suffers an injury "arising out of and in the course of employment".

court at 137 F. 2d 928 affirmed the following finding of the Commissioner:

> "Claimant herein was in the course of returning to work after a holiday in Honolulu and using a conveyance provided by the employer for such purpose. Therefore, the injury arose out of and in the course of employment."

Appellant suggests a different result is warranted here because any member of the public could ride the Army buses which were not restricted to Fort Irwin employees. But the underlying reason for employer liability under compensation acts where he provides the transportation to and from work is that he has "expanded the range of the employment and the attendant risks". 1 Larson, supra, at 282. Thus, the employee, because of the fact of his employment, can be hurt through the action of his employer, whether on the job or on the employer's bus. And it makes no difference, therefore, that non-employees are riding on the employer's conveyance, for the employee is just as much exposed to these risks whether or not he is sharing his ride with a non-employee. E.g., City and County of San Francisco v. Industrial Acc. Comm'n, 61 Cal. App. 2d 248, 142 P. 2d 760 (1943).

There is an additional and independent reason showing that Mrs. Hall's injuries must be viewed as having occurred in the performance of her duty. In Cardillo v. Liberty Mutual Insurance Co., 330 U.S. 469 (1947), the employee was driving home from work, driving his own car on the public highway, when

he was injured in an accident. The Deputy Commissioner of the United States Employees' Compensation Commission held that he could recover under the Longshoremen's and Harbor Workers' Compensation Act.[3/] An action was then brought in the courts to set aside the order. The Supreme Court held that the district court properly dismissed the complaint because the employer had contracted to and did furnish or provide transportation to and from work.

The situation in the present case corresponds exactly to that in Cardillo. Although there was no express contract that the United States furnish Mrs. Hall transportation to Fort Irwin, such a contract may be implied. The Army was not providing the bus service in order that the Barstow area have public transportation.[4/] It is significant that the only day time runs of the Army bus mentioned in Mrs. Hall's affidavit were the Barstow-Fort Irwin run leaving Barstow at 6:15 a.m. and the Fort Irwin-Barstow run leaving Fort Irwin at 4:30 p.m. Quite obviously, those runs were scheduled to bring Fort Irwin employees to and from work at the proper time. Although

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3/ The Longshoremen's and Harbor Workers' Compensation Act has been adopted as the Workmen's Compensation Law of the District of Columbia, D.C. Code, Title 36, Sec. 501 (1961 ed.).

4/ The district court case of Desousa v. Panama Canal Co., 202 F. Supp. 22 (S.D. N.Y., 1962), relied on by appellant (p. 9 of her brief) is thus not in point, since the plaintiff in that case was traveling to work on a public transportation system.

Mrs. Hall does not specify the times of the night-time runs, even more clearly they were designed to bring Fort Irwin's employees to and from Fort Irwin, for those runs were free of charge. While anyone could ride the buses, Mrs. Hall admits that they were used primarily by civilian and military employees of the United States. It is apparent that the only reason the United States was supplying the bus service was to bring Mrs. Hall and other civilian and military employees needing transportation to and from their jobs at Fort Irwin. And it is equally clear that the United States was furnishing the buses for the same reason that the employer in Cardillo was providing such service. Indeed, the description the Court gave of the job location in Cardillo exactly describes the present case:

> There was also evidence that the distant location of the Marine Base project, the hours of work and the inadequacy of public transportation facilities all combined to make it essential, as a practical matter, that the employer furnish transportation in some manner if employees were to be obtained for the job. This was not a case of employees traveling in the same city between home and work. Extended cross-country transportation was necessary. And it was transportation of a type that an employer might fairly be expected to furnish. 330 U.S. at 484.

"Each employment relationship must be perused to discover whether the employer, by express agreement or by course of dealing, contracted to and did furnish this type of transportation." Cardillo v. Liberty Mutual Insurance Co., supra, at 480. Here

it is clear that by "course of dealing" the Government contracted to furnish bus transportation to Mrs. Hall whenever she desired it to go to and from work.

Moreover, a recent decision of the Department of Labor under the FECA involving another Fort Irwin employee in the same accident as that which injured Mrs. Hall, still further confirms the view that Mrs. Hall was injured "while in the performance of her duty."

Jewel P. Young, a resident of Barstow, was a telephone operator at Fort Irwin. On November 24, 1963, she was riding to Fort Irwin on the same bus with Mrs. Hall. As a result of the accident, Mrs. Young was killed. Mrs. Young's administratrix brought suit against the Government under the Federal Tort Claims Act in Elaine M. Hall, Adm'x of the Estate of Jewel P. Young v. United States, (S.D. Calif. C.D., Civ. No. 64-1589-TC, 1965). Judge Clark granted the Government's motion for summary judgment on the ground that the plaintiff's exclusive remedy was under the FECA. (App.1a-3a). Mrs. Young's administratrix then brought an administrative claim for benefits under the FECA. The Department of Labor awarded benefits (App.5a,6a),thereby determining that Mrs. Young's injuries were incurred "while in the performance of her duty". Since Mrs. Young's estate received benefits, it is thus clear that Mrs. Hall, being injured under exactly the same circumstances, was also injured "while in the performance of her duty".

II. THIS COURT SHOULD AFFIRM THE DISMISSAL OF THE COMPLAINT AND SHOULD NOT STAY PROCEEDINGS PENDING FURTHER CONSIDERATION OF APPELLANT'S RECENTLY FILED CLAIM FOR BENEFITS UNDER THE FECA.

If this were a case where it were not clear whether FECA coverage existed, we would have no objection to appellant's request for alternative relief; namely, that this court stay proceedings until appellant is notified of the administrative decision on her pending claim under the FECA. This was the procedure followed in Somma v. United States, 283 F. 2d 149 (C.A. 3, 1960). The court there acted on the theory that it should stay judicial proceedings until the administrative body determined whether the injuries had been sustained in the performance of duty for the purpose of FECA coverage. But here there is no need for such a stay, for in light of the judicial decisions and the Department of Labor's action in granting relief to the estate of Jewel Young, Mrs. Hall's fellow passenger, there is no doubt that Mrs. Hall's injuries were "in the performance of her duty" and hence fall within the scope of the FECA.

Moreover, appellant should not now be allowed to contend that a stay should be granted. The accident occurred in 1963. But it was not until May 1966 that she filed a claim under the FECA.

Finally, we want to note that a stay is not warranted in order to see if the Department of Labor decides on the merits

actually to make an award of monetary benefits to Mrs. Hall. As we have shown above, it is clear that Mrs. Hall was injured within the performance of her duty, and hence falls within the scope of the FECA. Once an employee is within the coverage of the FECA, sole jurisdiction of the claim rests with the Department of Labor, and the question of the extent of monetary benefits to be awarded, if any, rests with the exclusive determination of the Secretary of Labor.[5/] This court has recently so held. Gunston v. United States, 235 F. Supp. 349 (N.D. Cal., 1964), aff'd 358 F. 2d 303 (C.A. 9, 1966); Soderman v. United States Civil Service Commission, 313 F. 2d 694 (C.A. 9, 1963), certiorari denied 372 U.S. 968.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

J. WILLIAM DOOLITTLE,
Acting Assistant Attorney General,

MANUEL L. REAL,
United States Attorney,

MORTON HOLLANDER,
Attorney,
Department of Justice,
Washington, D. C. 20530.

5/ 5 U.S.C. 793 provides in part:

> * * * The action of the Secretary or his designees in allowing or denying any payment under sections 751--756, 757--781, 783--791 and 793 of this title shall be final and conclusive for all purposes and with respect to all questions of law and fact, and not subject to review by any other official of the United States, or by any court by mandamus or otherwise, and credit shall be allowed in the accounts of any certifying or disbursing officer for payments in accordance with such action. * * *

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Morton Hollander

MORTON HOLLANDER,
Attorney,
Department of Justice,
Washington, D. C. 20530.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

ELAINE M. HALL, as Administratrix of the Estate of JEWEL P. YOUNG, Deceased,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

CIVIL NO. 64-1589-TC

JUDGMENT

Defendant's motion for summary judgment having come on for hearing on November 15, 1965, and the Court having made its Findings of Fact and Conclusions of Law, and good cause appearing therefor:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the within action shall be, and hereby is, dismissed.

DATED: This 15th day of November, 1965.

/s/ Thurmond Clarke
United States District Judge

[CAPTION OMITTED]

FINDINGS OF FACT AND CONCLUSIONS OF LAW
(Civ. No. 64-1589-TC)

This cause having come on for hearing on November 15, 1965, on defendant's motion for summary judgment, the plaintiff appearing by her attorneys, Hayton & Whitlock by Milton C. Dawson, Esq., the defendant appearing by Manuel L. Real, United States Attorney, Frederick M. Brosio, Jr., Assistant U. S. Attorney, Chief of Civil Division, and William B. Spivak, Jr., Assistant U. S. Attorney, by William B. Spivak, Jr., Esq.; and the Court having read the written briefs presented by counsel, having heard the oral argument of counsel, and being fully advised, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I.

On November 18, 1964, plaintiff filed the within action for damages for wrongful death under the Federal Tort Claims Act.

II.

On or about November 24, 1963, decedent, Jewel P. Young, was a civil service employee of the defendant, United States of America, in the position of a telephone operator at Headquaters, United States Army Armor and Desert Training Center, Fort Irwin, California.

III.

At the time of the collision complained of in plaintiff's Complaint, decedent, Jewel P. Young, was riding on a United States Army bus on her way to work.

IV.

Decedent, Jewel P. Young, was riding on said United States Army bus because of the fact of her employment.

V.

Any conclusion of law set forth in the foregoing findings of fact shall be deemed incorporated in the conclusions of law.

CONCLUSIONS OF LAW

I.

Plaintiff is subject to the Federal Employees Compensation Act, Title 5, U.S.C., §§ 751-803(a).

II.

Plaintiff's remedy under the Federal Employess Compensation Act is exclusive. This Court has no jurisdiction to award relief under the Federal Tort Claims Act. Title 5, U.S.C., § 757(b).

III.

Judgment should be entered dismissing the within action.

IV.

Any finding of fact stated in these conclusions of law is hereby adopted as a finding of fact.

DATED: November 15, 1965.

/s/ Thurmond Clarke
United States District Judge

U.S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
WASHINGTON, D.C. 20211

October 5, 1966 In Reply Refer to File

A13-240628

Your Ref: JWD:MH:REK
157-12-1337

Mr. J. William Doolittle, Acting Assistant
Attorney General, Civil Division
United States Department of Justice
Washington, D.C. 20530

Re: Sue H. Hall v. United States (C.A. 9, No. 21229).

Dear Mr. Doolittle:

In keeping with your request of October 5, 1966, I am enclosing copies of the following:

1) Letter dated July 18, 1966, signed by A. B. Schroeder.

2) Letter dated June 9, 1966, signed by A. B. Schroeder.

3) Letter dated March 24, 1966, signed by Arthwell C. Hayton.

4) Form CA-2, dated May 2, 1966, signed by Camilla C. Nelson.

5) Form CA-3, dated May 2, 1966, signed by Camilla C. Nelson.

6) Form CA-5, dated March 14, 1966, signed by Elaine M. Hall.

Sincerely yours,

/s/ W. J. Harren

W. J. Harren, Chief
Division of Claims

Enclosures

July 18, 1966

A13-240628

Law Offices
Hayton & Whitlock
505 Arrowhead Avenue
San Bernardino, California 92401

Dear Sir:

Payment of a burial allowance of $800 in the case of Jewel P. Young, deceased, as authorized by the Federal Employees' Compensation Act, has been approved.

Such payment is being made to Mrs. Elaine M. Hall as Administratrix of the Estate of Jewel P. Young and is being sent to Mrs. Hall at your office. She should receive a check shortly.

There being no showing that Mrs. Young was survived by any person qualifying as a beneficiary under the above Act, no further action by the Bureau is seen to be indicated.

Sincerely yours,

A. B. Schroeder
Assistant Deputy Commissioner

ABS:leb

cc: Mr. Manuel L. Real
U. S. Attorney
U. S. Department of Justice (Civil No. 64-1589-EC, S.D. Calif., CD)
312 North Spring Street
Los Angeles, California 90012

June 9, 1966

A13-240628

Law Offices
Hayton & Whitlock
505 Arrowhead Avenue
San Bernardino, California 92401

Dear Sir:

We have received reports of the accident resulting in the death of Jewel Edna Young on November 24, 1963 and have determined that the death comes within the scope of the Federal Employees' Compensation Act.

In order that we may disburse any burial allowance indicated, please furnish Form CA-42 or the required certificate covering the appointment of an administrator or executor. The necessary form and instructions were sent to you on April 12, 1966.

We should also be informed whether any claim was made against a third party other than the United States. Any damages so recovered, after deduction of a reasonable attorney's fee and costs of suit, would have to be offset by a compensation entitlement before any disbursement could be made.

Sincerely yours,

A. B. Schroeder
Assistant Deputy Commissioner

ABS:leb

cc: Mr. Manuel L. Real
U. S. Attorney
U. S. Department of Justice (Civil No. 64-1589-EC, S.D. Calif., CD)
312 North Spring Street
Los Angeles, California 90012

Law Offices
AYTON AND WHITLOCK

505 Arrowhead Avenue
San Bernardino, California 92401
TUrner 9-0471

D. Elliott Whitlock
Arthwell C. Hayton
Milton C. Dawson

March 24, 1966

U.S. Department of Labor
Bureau of Employees' Compensation
Washington 25, D.C.

Re: Jewel P. Young, Deceased

Gentlemen:

Enclosed please find a Claim for Compensation on Account of Death, together with an Affidavit in Support of Claim.

The reasn that this claim was not filed within one month after death occurred was due to the fact that originally we were advised by the representative from Camp Irwin, that a Complaint should be filed for Wrongful Death in the United States District Court, Southern District of California, Central Division. Such a Complaint was filed, No. 64-1589-EC.

After considerable legal proceedings, it was determined by the United States District Court, that at the time of the death, the decedent, Jewel P. Young, was riding on United States Army bus, because of the fact of her employment and that therefore, plaintiff is subject to the Federal Employees Compensation Act, Title 5, USC, paragraph 757 sub(b), which precluded the court from having jurisdiction. The court further directed that the claim then be filed as herein submitted.

Very truly yours,

s/ Arthwell C. Hayton

ARTHWELL C. HAYTON

ACH:al
cc: Mrs. Elaine M. Hall 25420 East 20th Street,
San Bernardino, Calif.

Place of employment

1. Department ... Army (Army, Navy, etc.) 2. Bureau or office G-6 Communication Division (Engineer, Navigation, etc.)

3. Place of employment USAADTC Fort Irwin California

Place of employment

3. Place of employment ... (Arsenal, navy yard, etc.) ... (City) ... (State)

4. Reporting office USAADTC, Fort Irwin, California
(Location of reporting office or division headquarters)

5. Name of superintendent or foreman in charge when injury occurred NA

The injured employee

6. Name of injured employee Jewel Pruitt Young (Give first name in full) 7. Age 52 8. Sex F 9. Citizenship Amer.

10. Home address 30659 E. Highway 66 (Street and number), Barstow, (City or town), Calif. (State)

11. Occupation and division Telephone Operator, GS-315 (Give both, as laborer, hull division; helper, machine shop, etc.) 12. Was employee doing his regular work? NO If not, what work? On way to work riding military bus ✓

13. Total length of service with the Government as a civilian? 4 years 23 days

14. How long at present work in this establishment? 4 years 23 days

15. Dates of other injuries None on record

16. Rate of pay on date of injury, $4240 per annum { and subsistence valued at $..... per ..... / and quarters valued at $..... per .....

17. Employee begins work at 12:00 (Hour, a. m. or p. m.) a.m. 18. Regular day's work ends 8:00 (Hour, a. m. or p. m.) a.m.

19. Hours worked per day 8 20. Days paid per week 5

The injury

21. Place where injury occurred
(Give exact location, as name or number of building and division, etc.)

22. Date of injury 24 November, 1963; day of week Sunday; hour of day 10:36 a.m. (a. m. or p. m.)

23. Date employee stopped work 22 November 1963; day of week Friday; hour of day 8:00 a.m. (a. m. or p. m.)

24. Date employee's pay stopped 22 November 1963; day of week Friday; hour of day 8:00 a.m. (a. m. or p. m.)

25. Has employee returned to work? NA
(Give date and hour)

26. Will employee receive pay for any portion of above absence on account of:
(a) Annual leave earned compensation paid heirs.
(Give exact dates)
(b) Sick leave
(Give exact dates)
(c) Any other reason
(Give exact dates)

27. Describe in full how injury occurred
Bus collided with cement laden trailer truck. Employee flung from bus and pinned under wheels of truck.

28. State part of body injured and nature and extent of injury Skull fracture--instant death.

29. Did injury cause loss of any member or part of member? ... If so, describe exactly
NA

30. Was employee injured while in performance of duty? NO If not, or in doubt, give detailed statement

31. Was injury caused by:
(a) Willful misconduct of the employee? NO (b) Intention of employee to bring about injury or death of himself or another? NO (c) Employee's intoxication? NO
(If any answers to these questions are made in the affirmative, the reporting officer should attach an additional statement giving the reason for his conclusion)

32. Was written notice of injury given within 48 hours? NO If not, did immediate superior have actual knowledge of injury? YES
(Answer to question 5, Form C. A. 1, must be complete if notice was not given within 48 hours)

33. Names and addresses of witnesses to injury
Mrs. Due H. Hall, 24683 W. Highway 66, Barstow, California
(If disability will continue for more than one day, have statements of witnesses made on reverse side of this form)

34. Was injury caused by a third party other than a Government employee or agency? ... If so, has employee been instructed in procedure under the Bureau's regulations?
(A detailed statement should be forwarded with this report)

Medical attendance

35. Name and address of physician who first attended case UNKNOWN

36. How soon after injury? UNKNOWN

37. To what hospital sent? UNKNOWN Location UNKNOWN

38. Name and address of physician now attending case NA

Signed this 2 day of May, 1964 at Fort Irwin, Calif.

Pamella C Nelson
(Signature of reporting officer)

Supv.
(Title)

C. A. 2
December 1961

(OVER)

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1. Department Army 2. Bureau or office G-4 Communication Division

1. Department ... 2. Bureau or office ... Communication Division
(War, Navy, etc.) (Engineer, Navigation, etc.)

3. Place of employment USAADTC, Fort Irwin, California
(Arsenal, Navy Yard, etc.) (City or town.) (State.)

4. Full name of injured employee Jewel Pruitt Young

5. Time of injury 24 November (Date.), 1963 Sunday (Day of week.) 10:36 a.m. (Hour, a. m. or p. m.)

6. Time employee stopped work 22 November (Date.), 1963 Friday (Day of week.) 8:00 a.m. (Hour, a. m. or p. m.)

7. Time employee's pay stopped 22 November (Date.), 1963 Friday (Day of week.) 8:00 a.m. (Hour, a. m. or p. m.)

8. First day employee was able to resume work ..... (Date.), 19 ..... (Day of week.) ..... m. (Hour, a. m. or p. m.)

9. Did employee return to the same work and at same rate of pay after termination of disability? .....
If so, when? ..... If not, state character of work performed upon return to duty and rate paid employee for such work .....

10. Actual time disabled (including Sundays and holidays) ..... days.

11. Number of days for which employee would have received pay had he not been disabled ..... days.

12. If employee was receiving subsistence as part of his wages, was such subsistence furnished during entire period of disability? ..... If not, give dates on which subsistence was not furnished .....

13. Has employee been paid for any portion of above absence on account of—
(a) Annual leave? Earned compensations paid heirs. (Give exact dates.)
(b) Sick leave? (Give exact dates.)
(c) Any other reason

14. Nature of injury Skull fracture--instant death

15. Remarks

[The following information is to be furnished *only* in case of death resulting from an injury sustained while in the performance of duty. If death results immediately, or if no Report of Injury has previously been submitted, such report, on Form C. A. 2, should be forwarded herewith.]

REPORT OF DEATH

16. Full name of deceased employee Jewel Pruitt Young

17. Time of death 24 November (Date.), 1963 Sunday (Day of week.) 10:36 a.m. (Hour, a. m. or p. m.)

18. Time employee's pay stopped 22 November (Date.), 1963 Friday (Day of week.) 8:00 a.m. (Hour, a. m. or p. m.)

19. Place of death Intersection Highway 91 and Fort Irwin Road Barstow (rural) San Bernardino county
(Name of hospital, establishment, etc.) (City or town, and State.)

20. Immediate cause of death Cerebral lacerations due to depressed compound skull fracture.

21. Widow of deceased employee NA
(Give full name.) (Address.)

22. Children of deceased employee under 18 years of age, or those over 18 who are incapable of self-support:

Name.	*Age.*
NONE	

23. Names, relationship, and addresses of all other persons known to be dependent, in any degree, upon decedent at time of death:

Name.	*Relationship.*	*Address.*
NONE		

Signed this 2 day of May, 1966 Carmella C Nelson
(Official superior.)

Fort Irwin, Calif Supv
(Title.)

RECEIVED OCT 13 1966

C. A. 3
Revised September 26, 1963

☆ U. S. GOVERNMENT PRINTING OFFICE : 1957—O-410417

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sation, WASHINGTON 25, D. C., through official channels WITHIN ONE MONTH after death occurred. If not so submitted, an explanation of the delay must accompany the claim.

The persons to whom compensation may be paid are:

(a) The widow who was living with or dependent for support upon the deceased employee at the time of his death.

(b) The widower who was dependent upon the deceased employee at the time of her death.

(c) The unmarried children under 18 and those over 18 who are incapable of self-support.

(d) Parents partially or wholly dependent upon the deceased employee for support.

(e) Unmarried brothers, sisters, or grandchildren under 18 years of age, and those over 18 who are incapable of self-support, and who were wholly or partially dependent upon the deceased employee.

(f) Grandparents wholly or partially dependent upon the deceased employee.

Under the law, the term "child" includes stepchildren, adopted children, and posthumous children, but does not include married children. The terms "brother" and "sister" include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but do not include married brothers or sisters. All of the above terms and the term "grandchild" include only persons who at the time of the death of the deceased employee are under 18 years of age or over that age and incapable of self-support. The term "parent" includes step-parents and parents by adoption. The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death. The term "widower" includes only the decedent's husband dependent for support upon her at the time of her death. The terms "adopted" and "adoption" as used in this law include only legal adoption prior to the time of the injury.

The claim should be signed by the person making the claim or his duly authorized representative. There should be given the names and addresses of all persons who may be entitled to compensation on account of death, together with the address of the person making the claim, which should be sworn to by the person entitled to compensation, or by the person authorized to act on his behalf.

Oaths of claimants residing in foreign countries should be made before a United States consular officer or secretary of legation or, if before a local official, a certificate of such United States consular official or secretary of legation showing the authority of the local official to administer oaths should be annexed.

A certified copy of the death certificate should accompany this claim. If, for any reason, it cannot be secured, give full explanation at the bottom of this sheet.

If the relationship to the decedent of any person entitled to claim compensation is that of adoption, a certified copy of the order of adoption should accompany this claim.

Itemized bills in duplicate covering the medical and burial expenses should be submitted with the claim.

1. Full name of deceased employee Jewel Edna Young
2. Age 51 3. Sex F 4. Occupation P. B. X. Operator
5. Was deceased able to speak English? Yes 6. If not, what language? _____
7. Time of injury: (a) November (Month); (b) 24 (Date) (c) 1963 (Year) (d) 10:36 p. m. (Hour, a.m. or p.m.)
8. Place where injury occurred 1st Street & Ft. Irwin Road, Barstow, California (Place or establishment, as "post office", "navy yard", etc.)
9. Nature and extent of injury Cerebral Laceration due to depressed compound skull fracture due to trauma
10. Date of death November 24, 1963
11. Place where death occurred 1st Street & Ft. Irwin Road, Barstow, California
12. Rate of pay of deceased employee at time of injury which resulted in death, $ 4240 per year and subsistence valued at $ _____ per _____
13. Relationship to the deceased of the person claiming to be entitled to compensation Daughter
14. Did deceased leave any other relatives entitled to compensation? No If so, give names, addresses, ages, and relationship below.

(See instructions at top of form for classes of persons entitled to compensation)

Name	*Address*	*Age*	*Relationship*

I HEREBY CERTIFY that each and every statement set forth above is true to the best of my knowledge and belief.

Name: Elaine M. Hall

Address: 25420 E. 20th St. (Street and number)

San Bernardino, Calif. (City) (State)

State of California }
County of San Bernardino } ss:

Subscribed and sworn to before me this 14th day of March, 1966

(Signature of official administering oath)

Notary Public in and for said County and State

APR 6 - 1966

ELEANOR BROOKINS
NOTARY PUBLIC
SAN BERNARDINO COUNTY
CALIFORNIA

C. A. 5
Revised May 24, 1960

XEROX COPY

NOTICE. Imprisonment for not more than one year, or by both such fine and imprisonment.

AFFIDAVIT IN SUPPORT OF CLAIM under the provisions of the Compensation Act of September 7, 1916, is hereby made by the undersigned:

is hereby made by the undersigned.

Full name of decedent Jewel Edna Young

Full name of decedent Jewel Edna Young

Name of claimant answering questions below Elaine Marie Hall

1. What was the date of your birth? May 1 1930
(If under legal age, claim should be made by guardian) (Month) (Date) (Year)
2. What is your relationship to decedent? Daughter
3. Were you wholly or partially dependent upon decedent for support at the time of his death? No
4. What was amount contributed by decedent for your support during the twelve months immediately preceding his death? None
5. Did the decedent live with you during the year immediately preceding his death? No If so, what, if anything, did he pay you in money or in work for board and room in addition to the contribution for your support stated above? None
6. If no fixed amount was paid for board and room furnished, what is the fair value of such board and room? None
7. Were you employed during the twelve months immediately preceding the decedent's death? Yes If so, give occupation Nurse's Aide, rate of pay $1.50 per hour, and total earnings $240 per month
8. What was your total income from all other sources (except the contribution of decedent and your wages) during the twelve months immediately preceding the death of the decedent? None
9. What persons, if any, were wholly or partially dependent upon you and were supported by you out of this income? (Give relationship of each person.) None
10. If married, and your husband (or wife) was employed during the twelve months immediately preceding the death of the decedent, give age 35, occupation Main. Engineer, rate of pay ____ and total earnings $385.00 per month
11. If married, what, if any, income did your husband (or wife) have other than already stated by you during the twelve months immediately preceding the death of the decedent? None
12. If you claim dependency for support on the decedent at the time of his death, state in detail any other circumstances which would tend to show such dependency None
13. What is your total present income per month from all sources? $550.00 per month - Husband's wages
14. What property did you own at the time of the death of the decedent? None
Value and location of real estate ____
Value of personal property None
15. What, if any, property in addition to the above do you own now? None
16. What property does your husband (or wife) own other than that described in questions 14 and 15 above? (Give value and location.) None

I HEREBY CERTIFY that each and every statement set forth above is true to the best of my knowledge and belief.

State of California
County of San Bernardino } ss:

Name: Elaine M. Hall
Address: 25424 E. 20th St.
(Street and number)
San Bernardino, Calif.
(City) (State)

14th March 66

Subscribed and sworn to before me this ____ day of ____, 19

Eleanor Brookins
Notary Public in and for said County and State.
(Signature of official administering oath)

(Title)

ELEANOR BROOKINS
NOTARY PUBLIC
SAN BERNARDINO COUNTY
CALIFORNIA

13 APR 6-1966
(In and for)

XERO COPY

No. 21,232

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant and Cross-Appellee,

v.

HANNA NICKEL SMELTING COMPANY, a corporation, and
THE HANNA MINING COMPANY, a corporation,

Appellees and Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES AS APPELLANT

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v.

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Appellees and Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES AS APPELLANT

JURISDICTIONAL STATEMENT

This action to recover alleged erroneous overpayments made to Hanna Nickel Smelting Company under a public contract, and to obtain reformation of the price paid under a portion of the contract, was brought by the United States under 28 U.S.C. 1345. The total recovery sought was $1,641,974.57 plus interest from the dates of the overpayments. The district court (Chief Judge Gus J. Solomon presiding) tried the case without a jury, and on February 24, 1966,

entered its opinion (R. 375).[1/] On April 27, 1966, a supplemental opinion, and the final judgment awarding the United States $473,304.32 plus prejudgment interest of $87,328.57 were entered (R. 465, 468). Appeals from that judgment were noted, by the United States on June 23, 1966, and by the defendants on the following day (R. 470, 472). On July 27, 1966, the district court extended the time for docketing the appeals to August 22, 1966, and the appeals were docketed in this Court on that date (R. 493). The Court has jurisdiction of these appeals under 28 U.S.C. 1291.

STATEMENT OF FACTS

During the Korean War, the Government became concerned about the lack of facilities in the United States for the production of nickel, an essential defense metal (R. 215). In February 1951, the then Chairman of the Preparedness Subcommittee of the Senate Armed Services Committee (Senator Lyndon B. Johnson) invited the then president of the M. A. Hanna Company (George M. Humphrey) to report to the Subcommittee its plans for developing the nickel deposits in Oregon on which the company had obtained options, including the need, if any, for Government aid (R. 215). In 1952, The Hanna Mining Company (M. A. Hanna Company then owned 59% of its voting stock) commenced negotiations with the Defense Materia

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1/ The reference "R." is to the transcript of record; three xeroxed copies of the record have been provided for the use of the Court.

Procurement Agency for a contract for the development of a nickel mine and smelter (R. 214-215).

On January 16, 1953, The Hanna Mining Company (hereafter "Hanna Mining") contracted with the Government to open and operate a mine on property it had leased in Oregon and to sell nickel-bearing ore (a minimum of 95 million pounds and a maximum of 125 million pounds) from that mine to the United States on specified terms (R. 215-216). During the term of that contract, from January 1953, through March 1961, the Nickel Division of Hanna Mining -- according to its tax returns, books and records -- realized a net profit after taxes of $10,469,814 on the sale of ore to the United States (R. 218). During the same period, the total cost of operating the Nickel Division was $12,022,898 without taking taxes into account (R. 218). These figures indicate that Hanna Mining realized a profit of more than eighty-seven percent (87%) of incurred costs on its contract with the Government.[3/]

Also on January 16, 1953, the Government entered into a contract with a wholly-owned subsidiary of Hanna Mining, Hanna Nickel Smelting Company (hereafter "Hanna Smelting"), incorporated on January 15, 1953 (R. 214).[4/] Under that contract,

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2/ The Defense Materials Procurement Agency was then an independent agency of the United States; in August 1953, the agency was abolished and its functions transferred to the General Services Administration (R. 214).

3/ According to the appellees, the net profit was some $2.9 million less than the $10.4 million figure because of adjustments they believed appropriate "for expenses of development, research, administration, exploration and similar items" (R. 218).

4/ Two contracts in addition to the mining and smelting contracts were entered into on January 16, 1953. In one (continued)

the Government agreed to finance with public funds Hanna Smelting's activities in developing a commercially feasible process for smelting ore from the Nickel Mountain, Oregon, mine; in building smelting facilities adjoining the mine in which to apply the process; and in operating the smelter to produce, during the period of the contract, an agreed quantity of refined nickel for sale to the United States. In addition, the Government agreed to sell to Hanna Smelting -- without profit -- all the ore it purchased from Hanna Mining (R. 216). In practice, Hanna Mining delivered the ore directly to Hanna Smelting; the latter then paid its parent company for the ore and obtained reimbursement from the Government (R. 216).

The dispute in this litigation involves the meaning and construction of various provisions of the contract between Hanna Smelting and the Government.

1. The Contract Between Hanna Nickel Smelting Company and the United States.

Under the contract between Hanna Smelting and the United States, Hanna was immediately to erect the facilities necessary

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4/ (continued) of them, Hanna Mining agreed to provide Hanna Smelting with management supervision for a cash consideration of $100,000 per year after September 30, 1955 (R. 216). Hanna Smelting, in turn, was entitled to treat those amounts as "costs of production" under its contract with the Government and obtain reimbursement from the United States for them (R. 207). In the other contract, Hanna Mining guaranteed reimbursement to the United States in the event Hanna Smelting spent the funds advanced by the Government in violation of the smelting contract (R. 216).

for testing the process of smelting ore from the Oregon mine (Pl. Exh. 1, p. 1),[5] and if the process proved feasible, to complete the facilities needed for the production of a minimum of 95 million pounds and a maximum of 125 million pounds of saleable ferro-nickel for sale to the Government under the contract (ibid.).[6] In this connection, Hanna Smelting agreed to undertake in France tests on the production of nickel from Nickel Mountain ore by the "Ugine Process" (Pl. Exh. 1, p. 2). Thereafter, Hanna Smelting was to report the results to the Government and obtain reimbursement for the costs incurred (ibid.).[7]

The heart of the contract is contained in Article IV (dealing with the smelting facilities to be built), in Article VI (governing advances of capital and operating money to Hanna from the United States), and in Article VIII (establishing the price to be paid by the United States for the smelted nickel). More specifically, Article IV, "Facilities", provides (Pl. Exh. 2, p. 2):

5/ "Pl. Exh." refers to the Government's exhibits in the district court; "Dft. Exh." will be used in referring to the exhibits introduced by the appellees. Three copies of most of the more significant exhibits have been xeroxed for the use of the Court and may be found in the tabbed Book of Exhibits.

6/ Saleable ferro-nickel was defined as ferro-nickel in sound ingots of 20 to 60 pounds size with a minimum of 25 percent nickel content and containing less than specified amounts of specified impurities (Pl. Exh. 1, p. 2).

7/ An amendment to the contract authorized additional tests to be made in France (Pl. Exh. 2, p. 2).

> With Advances made by the Government as provided in Article VI, the contractor will construct and equip (including any necessary redesigning, rebuilding and repair) * * * a facility for the conversion of ore from the Mine into saleable ferro-nickel. * * * [T]he facility shall consist of * * * [specifically described items of equipment] 8/ and all equipment and facilities agreed to by the Government as necessary for such conversion of ore from the Mine into saleable ferro-nickel. * * * The facility, as it exists from time to time as contemplated by this Article or as it may be substituted for from time to time with the approval of the Government, is hereinafter called 'the Facility'.

Hanna Smelting's activities were to be financed almost entirely with public funds. The contract provision regulating financing (Article VI, "Advances") provided for two types of cash advances to be made by the Government: "capital advances" and "working capital advances" (Pl. Exh. 1, pp. 4-5). With respect to capital advances, Article VI, paragraph 1, provided (ibid.):

> Upon the Contractor's written request, the Government will make advances (hereinafter called "Capital Advances") of the entire amount up to a total of $22,875,000 9/ * * * required (a) to test the process as provided in Article II, * * * , (b) to construct, equip, design and rebuild the Facility contemplated by Article IV * * * , (c) for such replacements or improvements of the Facility

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8/ Following is a list of the equipment specifically described in Article IV: "one electric refining furnace, two electric melting furnaces, one electric ferro-silicon furnace, one electric slag melting furnace, a slag-disposal site and equipment, a stockpile site and stockpiling equipment, a sewage-disposal plant, railroad spurs, housing for personnel, preliminary construction and foundations for two additional electric melting furnaces and facilities as may be required after Period 1" (Pl. Exh. 2, p. 2).

9/ That amount was increased from $22,000,000 by Amendment No. 4 dated November 8, 1957 (R. 206; Pl. Exh. 16).

> which are agreed by the Contractor and the Government to be necessary or advisable during the period of this Contract, and (d) for such other necessary and so agreed upon expenditures which, in accordance with generally accepted accounting practice, are capitalized.

With respect to working capital advances, Article VI, paragraph 2, provided (Pl. Exh. 1, pp. 4-5):

> Upon the Contractor's written request from time to time * * * , the Government will advance to the Contractor sums (hereinafter called "Working Capital Advances") representing its reasonable minimum working capital requirements so long as the sum of such request plus Working Capital Advances then outstanding does not exceed $3,750,000. 10/ * * * Working Capital Advances may be requested and used by the Contractor to pay any costs and expenses hereunder of the Contractor, including costs arising from the payment of tax liability or other source, not covered by Capital Advances * * * .

Article VI further required that "Capital Advances and Working Capital Advances shall be kept in separate accounts at a bank or banks approved by the Government, shall not be commingled with each other or with other funds" and shall "bear interest at 5% computed on a daily basis" (id. at p. 5). All advances were to be evidenced by notes and secured by mortgages on "the Facility" (id. at pp. 5; 16-17). 11/

10/ That amount was increased from $2,800,000 by Amendment No. 4 (Pl. Exh. 16; R. 206).

11/ From January 1953 to April 1961, the Government made total capital advances of $22,300,000 and working capital advances of $69,945,000 (R. 298). Although an additional $575,000 of capital advances was authorized by the contract, Hanna Smelting never requested that that amount be advanced and, in fact, it refunded $27,444 of unused capital advances during that period (R. 298).

The contract did not per se provide for a profit to be made by Hanna Smelting on the sale of refined nickel to the United States. Rather, Article VIII -- "Sale and Purchase of Ferro-nickel" -- provided that the price per pound to be paid by the United States would be determined by adding (R. 207): 12/

> (a) the Contractor's actual cost of production per pound of contained nickel (but not more than * * * [the agreed ceiling]) and (b), but only in the case of the first 95,000,000 pounds of contained nickel in ferro-nickel * * * sold to the Government, an amount per pound of contained nickel (hereinafter called "Amortization Payment") sufficient to amortize the Capital Advances made pursuant to Article VI plus interest thereon.

Article VIII then set forth the meaning of "actual cost of production" for which the contractor would be reimbursed (R. 207-208):

> The Contractor's actual cost of production * * * [shall be subject to the agreed ceiling and] shall mean and include (a) until the end of the three year period from the calendar quarter commencing closest to the beginning of Period 3, 13/ all theretofore unrecovered costs and expenses hereunder of the Contractor * * * not covered by Capital Advances and which arise from operations, payment of royalties, management and consultants' fees, insurance, interest on Working Capital Advances, state and local taxes, or other sources, excluding federal income taxes and (b) thereafter, for each running period of three consecutive years, only such costs and expenses * * * as are incurred during or with respect to such three year period.

12/ Article VIII, as originally executed, was modified by Amendments 3 and 4. The language set out above reflects the clause as amended.

13/ Period 3 commenced on September 30, 1957 (R. 208).

The Government was to pay for each lot of saleable ferronickel delivered promptly after receipt of Hanna Smelting's invoice covering the lot (Pl. Exh. 1, p. 10). The amortization payments (i.e., the "capital advance repayments") were to be deducted from the amounts of the invoices and credited first against interest on capital advances and then against outstanding capital advances (ibid.).

The contract also specified various optional methods for its being terminated (Pl. Exh. 1, pp. 12-15). The option actually exercised, contained in Article XIV, provided that (id. at p. 13):

> [T]he Contractor will pay to the Government the amount of the then unpaid Capital Advances together with accrued interest thereon plus the amount of any unpaid Working Capital Advances together with accrued interest thereon, and plus an amount (hereinafter referred to as the "Residual Payment") equal to 7-1/2% of total Capital Advances excluding advances for capital replacements.

Upon Hanna Smelting's repayment of all outstanding advances and payment of the residual payment under the option, the Government was to transfer to it clear title to the entire facility. 14/

14/ In March or April 1961, Hanna Smelting exercised the option to purchase the smelter and made a negotiated residual payment of $1,721,653 to the Government; in return, it received clear title to the smelter (R. 217, 298). The extent to which Hanna profited from exercising the option is documented in the record. In May 1960, Hanna had insured the facility for $16,514,000, and in January 1962, the American Appraisal Company set its fair market value as of January 1, 1961, at $10,670,000; the Oregon State Tax Commission and Hanna Smelting agreed for State tax purposes that the smelter had a value of $15,113,240 in 1961 (R. 218). Thus, for the sum of $1.7 million, Hanna Smelting obtained from the United States a smelter worth at the very least $10.7 million, and more likely worth in excess of $15 million.

The contract thus did not provide for a profit as such to be made by Hanna Smelting on the sale of nickel to the United States. Rather, it provided that the Government would lend Hanna up to $22,875,000 of public funds to construct the Facility and would advance the funds needed to operate the Facility to produce the agreed quantity of smelted nickel for sale to the United States. And the contract further provided for the Government, when purchasing the smelted nickel, to reimburse Hanna for its actual costs of production (up to the agreed ceiling price per pound), including a management fee of $100,000 a year to be paid by Hanna Smelting to its parent corporation, Hanna Mining. See fn. 4, supra, pp. 3-4. Thus, Hanna Mining received a profit of $10,469,814 (of 87% of costs) on the nickel mining contract, and a "management fee" of at least $500,000 ($100,000 per year for at least the five years September 1955 through September 1960) on the smelting contract. In addition, Hanna Smelting was expected to, and did, obtain a very substantial profit when, by paying the difference between the cost of the facility and approximately 7 1/2% of that amount, it obtained clear title to the facility. Thus, in addition to the $10,469,814 profit and management fees of at least $500,000 made by Hanna Mining as a result of the contractual arrangements, its wholly owned subsidiary, Hanna Smelting, obtained for the sum of $1.7 million a smelting facility worth more than $15 million, for a profit of more than $13.3 million. See fn. 14, supra, p. 9. And, ever since its acquisition of the smelter, Hanna

has been using the facility for the profitable commercial production of smelted nickel.

This litigation does not concern the fact that the Hanna Companies effectively realized a profit of more than $24,000,000 under the contractual arrangements, with an expenditure of only about $12 million. Rather, it concerns the question of whether, in addition to the profits contemplated by the contract as set forth above, Hanna had a right to charge to the Government substantial expenditures (approximately $1.4 million) for replacements and improvements and additions to the facility, over and above the more than $22 million contemplated for capital expenditures, and without approval by the Government, when most of those items of equipment were long lived and could be expected to be (and were) used by Hanna for commercial production of nickel after the termination of contract here. 14a/

2. The Nature of the Litigation.

a. The Government's Main Claim.

This suit essentially involves the propriety of Hanna Nickel Smelting Company's treatment as costs of production (rather than as capital expenditures) of $1,392,376.55 spent for 216 items that appellees conceded were literally additions, replacements,

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14a/ The uncontradicted evidence is that at the time of trial, Hanna Smelting was still using disputed items which had cost a total of $715,899 -- or more than one-half of the total -- in the highly profitable commercial production of nickel. See Pl. Ex. 72 and fn. 37a, p. 52, supra.

or improvements to the smelting facility.[15] In terms, the contract contemplated that additions, modifications and "replacements or improvements of the Facility" would be treated as capital items. Article VI, para. 1, clause (b) quoted, supra, pp. 6-7 . As mentioned above (supra, p. 6), however, the contract set a dollar limit ($22,875,000) on capital expenditures that would be shouldered by the Government, and required that Hanna obtain the approval of the Government as to the necessity for, or advisability of, making such expenditures. By December 31, 1957, Hanna had spent $22,300,000 on capital items, virtually exhausting the capital funds available (Pl. Exh. 7). By contrast, the contract gave Hanna Smelting sole discretion to determine the necessity for or advisability of, expenditures for costs of production, and placed a dollar limit on costs; during the life of the contract, Hanna was, with a minor exception, able to stay within that dollar limit. Since Hanna had not sought or obtained the approval of the United States as to the spending of the almost $1.4 million involved here, and since (in the Government's view) the expenditures for additions, replacements, or improvements to the facility were for capital items and not for costs of production, the Government claimed that Hanna had overcharged it for nickel by that amount (Complaint, First Count, R. 1-4). Stated otherwise, Hanna

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15/ In the Defendants' Brief After Second Trial filed in the district court, the appellees conceded (ibid. p. 6) that "most if not all of the disputed items were in a sense literally additions or replacements or improvements * * * ."

The complaint as initially filed by the Government sought recovery of over $1.7 million expended for 284 items of equipment (R. 3). During the course of the litigation, the amount sought was reduced to the present figure of approximately $1.4 million.

Smelting stood to obtain three distinct advantages from treating expenditures for the disputed items as costs of production rather than as capital expenditures. First, it did not need to obtain governmental approval of expenditures for costs of production, whereas such approval was required for the spending of capital advances. Second, since Hanna was able over almost the entire life of the contract to produce nickel at less than the agreed price per pound limitation, it could easily pass the cost of all the disputed items on to the Government as reimbursable costs of production; on the other hand, since a firm dollar limitation had been set on capital advances, it could not have done so had it followed the capital advance route. And third, by not treating the expenditures as capital expenditures, it reduced the price it was required to pay to obtain title to the Facility upon contract termination (i.e., it paid 7 1/2% of a reduced figure).

More specifically, the basis of the Government's claim may be summarized as follows: The price the Government was to pay for nickel under Article VIII of the contract (supra, p. 8), was to be that amount (subject to a ceiling price) which would reimburse Hanna Smelting for its "actual cost of production per pound of contained nickel." 16/ That article defined "actual cost of production" as the "costs and expenses hereunder of the Contractor * * * not covered by Capital Advances and which arise from operations * * * " (emphasis supplied).

16/ That amount was to be reduced by the "amortization payment" -- the figure calculated to credit the Government on a poundage basis with the funds advanced to Hanna to make capital expenditures (see p. 8 , supra).

Under Article VI, paragraph 1 (supra, pp. 6-7) capital advances of up to the total amount of $22,875,000 were available --

> "(a) to test the process * * * ,"
>
> "(b) to construct, equip, design and rebuild the Facility contemplated by Article IV,"
>
> "(c) for such replacements or improvements of the Facility which are agreed by the Government to be necessary or advisable during the period of this Contract, and"
>
> "(d) for such other necessary and so agreed upon expenditures which, in accordance with generally accepted accounting practice, are capitalized."

And, Article IV (supra, p. 6) defined "the Facility" as follows:

> [T]he facility shall consist of * * * [specifically described equipment] and all equipment and facilities agreed to by the Government as necessary for such conversion of ore from the mine into saleable ferro-nickel. * * *

Reading Articles IV and VI together -- i.e., replacing "the Facility" in clauses (b) and (c) of Article VI with the definition of that term in Article IV -- capital advances were available (for among other things):

> (b) to construct, equip, design, and rebuild the specifically described equipment and all equipment and facilities agreed to by the Government as necessary for such conversion of ore, and
>
> (c) for such replacements or improvements of the specifically described equipment and all equipment and facilities agreed to by the Government as necessary for such conversion of ore, which

are agreed by the Government to be necessary or advisable during the period of this Contract.

The disputed expenditures, the Government urged, fit into those categories for which capital advances were available under Article VI; they were not, therefore, properly treated as costs of production.

For example, among the original equipment purchased by Hanna for the smelter were "two dutch oven type dryer furnaces." 17/ The purpose of the ovens was to heat two dryers designed to remove the moisture contained in the nickel ore. The two original dutch ovens were purchased by Hanna Smelting with capital advances of $89,110 -- they were not purchased with working capital advances and were not treated as "costs of production". By 1957, Hanna determined that the ovens did not have sufficient capacity to supply the necessary heat and that, to dry the ore properly, replacement units were necessary. Hanna decided to purchase two new dutch ovens having almost twice the heating capacity of the old ones and better draft characteristics, and costing $97,372.90. The new ovens had an estimated useful life of twenty years (Pl. Exh. 166).

In the Government's view, the new dutch ovens were "replacements or improvements" of equipment originally agreed to by the Government as necessary for the conversion of ore, within the meaning of clause (c), paragraph 1, of Article VI. Accordingly,

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17/ The description of the dutch ovens that follows is taken from Pl. Exh. 82, Item 43. That exhibit contains the parties' stipulated, agreed descriptions of all the disputed items.

capital advances should have been employed for the purchase of the dutch ovens, provided the Government agreed that the expenditures were "necessary or advisable" and provided the ceiling on capital expenditures (then $22,000,000) had not been exceeded. Hanna Smelting did not, however, ask the Government to make capital advances to cover the expenditure of $97,372.90 for the ovens. Instead of seeking Government approval of the expenditure -- as would have been necessary were capital advances requested -- Hanna used working capital advances to purchase the ovens -- even though it had convenanted to use working capital advances only "to pay any costs and expenses * * * not covered by Capital Advances" (Article VI, paragraph 2). Hann then treated the purchase price of the ovens on its books and records as "actual costs of production" for which it thereafter obtained reimbursement since the price the Government paid for nickel under Article VIII was designed to reimburse Hanna's "actual cost of production per pound of contained nickel."

Each of the 216 disputed expenditures, the Government urged, was similar to the expenditure for the dutch ovens. Since each was an expenditure for additions, replacements, or improvements to the smelting facility, Hanna Smelting breached its contract in two ways: first, it used working capital advances to acquire capital items, thereby circumventing the requirement that it obtain the agreement of the Government that additional capital expenditures were "necessary or advisable"; second, it caused the Government to overpay for nickel by almost $1.4 million by treati

the expenditures for the 216 disputed items as reimbursable costs of production when in fact they were not costs of production under the contract terms.

The appellees' main line of defense to the Government's claim was that the accounting treatment of the 216 disputed items was to be determined solely by reference to accounting practice in the smelting industry. Its theory was that the words "which, in accordance with generally accepted accounting practice, are capitalized" that appear in clause (d) of Article VI, paragraph 1 (supra, p. 7) must be read into clauses (b) and (c). And, going one step further, Hanna urged that the phrase "generally accepted accounting practice" used in the contract actually meant "generally accepted accounting practice in the smelting industry." Thus, in Hanna's view, clause (c), paragraph 1, Article VI must be read -- not as written (see p. 7 , supra) but rather -- as providing that capital advances were to be used "for such replacements or improvements as are required to be capitalized in accordance with generally accepted accounting practice in the smelting industry." 18/ On this theory, Hanna claimed that all 216 expenditures were properly expensed rather than capitalized.

In response to this argument, the Government argued in the alternative that even if -- contrary to the plain language of the contract -- the phrase "generally accepted accounting practice" appearing in clause (d) were to be read into clauses (b)

18/ See pp. 7-8 of Defendants' Brief After Second Trial.

and (c), there was absolutely no indication (in the contract or otherwise) that the parties intended that phrase to mean accounting practices peculiar to the smelting industry. And, the Government pointed out, if generally accepted accounting practice governed, then 201 of the 216 disputed items, costing a total of $1,372,845.57, were improperly charged by Hanna Smelting to cost of production. 19/

Hanna's second line of defense to the Government's claim consisted of various "equitable claims and defenses." In its answer to the Government's complaint, Hanna contended that the Government's claim was barred by laches and that, if the disputed items had been complained about during the course of the contract, the United States would "in any event" have borne their cost (R. 143-144). Another defense asserted was that Hanna Smelting's accounting treatment of the disputed items was fully known to the Government's "authorized representatives" during the course of performance of the contract and that, in reliance on the Government's failure to object, Hanna "changed its position to its detriment" (R. 144-145). The change in position alleged was that, had Hanna timely known of the Government's objection to its treating allegedly capital items as reimbursable costs of production, it could have refrained from making the expenditures unless the Government furnished capital advances to

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19/ Pl. Exh. 172 demonstrates that if generally accepted accounting practices obtain, then only 15 of the disputed items, costing a total of $19,530.98, would not be recoverable. Of that amount, the exhibit further shows, $11,226.39 would not be recoverable only because the record lacked sufficient evidence on which to conclude that it was improperly expensed.

cover the expenditures (R. 145). Based on these allegations, Hanna asserted that the United States "is and should be estopped in equity and good conscience from attempting to assert its present position and it has waived the right to do so" (ibid.). Finally, the answer alleged, even if Hanna Smelting "did not literally comply in all respects with the express terms of" the contract, the Government sustained no damage because the challenged expenditures reduced the cost of producing nickel "by not less than $865,119" (ibid.).

b. The Government's Subsidiary Claims.

The complaint filed by the United States in this action stated three counts in addition to the first count (R. 1-4), which sought recovery of almost $1.4 million of alleged overpayments, as summarized above. The second count of the complaint sought recovery of other amounts erroneously paid Hanna Smelting as reimbursement for three particular items charged to costs of production (R. 4-5). That count was dismissed by stipulation on February 12, 1964, after Hanna Smelting paid the Government $63,525.47, representing the full amount of the claim plus 6% interest (R. 118-119).

The third count alleged that by amendment to the contract, the parties agreed that deliveries of smelted nickel after March 31, 1961 -- 105,500,137 pounds had been delivered as of that date -- would be paid for at a price per pound (not in excess of 58.77 cents) that would repay Hanna Smelting its average

actual cost of production per pound of contained nickel (R. 5).[20] The computation of the ceiling price of 58.77 cents per pound had been based on an agreed formula incorporating the figures reported by Hanna Smelting as its costs of production for 1959 and 1960 (R. 5). However, since many of the disputed expenditures challenged in count one had been charged to costs of production in 1959 and 1960, the ceiling price did not reflect the intent of the parties to establish a ceiling based on Hanna's actual costs of production during 1959 and 1960 (R. 6). Accordingly, reformation downward of the ceiling price and recovery of the resulting overpayment were sought (R. 6).[21] Hanna's defense to the count for reformation was that revision downward of the 58.77 cents per pound ceiling price would be "inequitable" (R. 137-143).

The final count of the complaint alleged that Hanna Mining Company was joined as a party on its agreement to reimburse the United States in the event its subsidiary, Hanna Smelting, expended public funds in violation of the smelting contract (R. 6). Hanna Mining admitted that it had guaranteed proper performance by Hanna Smelting (R. 143).

20/ From March 31, 1961, until the time the complaint was filed, 2,186,409 pounds of nickel had been delivered and paid for at the rate of 58.77 cents per pound; at the time the complaint was filed, Hanna Smelting was still obligated to deliver an additional 17,313,454 pounds of nickel (R. 5).

21/ After the complaint was filed, the parties entered into an agreement by which Hanna's obligation to deliver the additional 17,313,454 pounds of nickel required by the contract was terminated in consideration of a cash payment to the Government (R. 132). This agreement was consummated apparently because it was more profitable for Hanna to sell the smelted nickel commercially rather than to the Government under the contract. That agreement also provided that if the 58.77 cents ceiling price were revised downward in this litigation, Hanna would pay the United States an amount equal to 17,313,454 times the difference between 58.77 cents and the revised ceiling (R. 135).

3. The Proceedings in the District Court.

After the pleadings were filed, the district court granted, over the Government's objections, Hanna's motion under Rule 42(b), F.R. Civ. P., for a separate trial on the "equitable issues and defenses" raised by their answer (R. 147). In October 1964, following the entry of an extensive pretrial order (R. 201-251), those issues were tried to the district court.[22/] Then, in May 1965, the district judge wrote the parties that he had decided to hear all the evidence and render a decision on the entire case, rather than decide it "piecemeal" (R. 286). Thereafter, an extensive supplemental pretrial order (R. 295-331) was entered, and in July 1965 the main issues were tried to the district court.[23/] As a result of the extensive pretrial proceedings, many of the facts were stipulated and a great deal of the evidence is documentary.[24/] As a result, the live evidence taken on the main issues consists largely of the opinion testimony of various accountants.

22/ The reporter's transcript of that trial comprises Volumes 3 and 4 of the Transcript of Record in this Court. The evidence on the issues at the first trial is summarized and discussed in the portion of the argument dealing with those issues, infra, pp. 86-93. "Oct. Tr. ___" will be used in referring to that transcript of the October 1964 trial.

23/ The reporter's transcript of the July trial is in four volumes and comprises Volumes 5 through 8 of the Transcript of Record in this Court. The reference "Jul. Tr. ___" will be used in referring to that transcript.

24/ In excess of 300 exhibits were introduced at the trials (see R. 324, 328).

Among the evidence introduced at the trials were various drafts of the smelting contract prepared by the parties during contract negotiations. Other exhibits reflect on each party's construction of the terms of the contract during the course of performance. These exhibits will be summarized and discussed in the argument portion of this brief. A central exhibit previously mentioned (supra, p. 14), contains the agreed descriptions of the 216 disputed items charged by Hanna Smelting to costs of production (Pl. Exh. 82). One of those items -- Item 43, the expenditure of $97,372.90 for "two dutch oven type dryer furnances" -- was previously mentioned. Another example of the nature of the disputed items, concerns the expenditure of $198,746.62 for "dust collecting equipment," Item 49.[25/] The smelter, as originally constructed, contained dust collecting equipment designed to remove nickel particles escaping from the facility in the form of dust. The $216,000 cost of the original dust collecting equipment was paid with capital advances (and accordingly was not treated as costs of production). The dust problem, however, was more acute than Hanna had originally anticipated and Hanna decided to install a more efficient type of dust collecting equipment. In 1957, $893,364 was expended for the new equipment, for removing the

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25/ The facts relating to this item in Pl. Exh. 82 were augmented by stipulation entered in November 1965, following the trial (R. 336-337), and by Pl. Exh. 89.

old equipment, and for removing and replacing the necessary ducts. Of that total amount, "$694,618 which pertained to the new equipment were charged to a capital account," i.e., capital advances were used to cover the expenditure. However, $198,746.62 of the total amount was charged to costs of production. Of the latter figure, $114,234.82 was expended for "fabrication, equipment, erection and installation of new dust collection equipment," and $47,933.83 was spent "for removing old dust collection equipment" (R. 337). It is uncontradicted that, when installed, the dust collecting equipment had a useful life of 15 years (Pl. Exh. 166), and the equipment was being used by Hanna in connection with the commercial production of nickel at the time of the trial of this action (Pl. Exh. 72).

In addition to the documentary exhibits introduced into evidence, the Government presented the testimony of an expert accounting witness, Dr. Howard W. Wright, who is a professor of accounting and a certified public accountant and has had extensive Government contract experience (Pl. Exhs. 178, 179). Dr. Wright testified that if a contract sets out the basis for determining whether to capitalize or expense an expenditure, proper accounting procedure requires that the contract terms, and not general accounting principles and practices, be applied (Jul. Tr. 33, 37). Dr. Wright pointed out, however, that in the present case there were only minor differences between the

accounting procedures dictated by the contract terms and those required under generally accepted accounting principles (Jul. Tr. 38). He then testified that each of the 216 disputed expenditures were improperly treated under the terms of the contract as costs of production (Jul. Tr. 52-127). Dr. Wright further testified, in support of the Government's alternative position, that if generally accepted accounting practice were intended to control the allocation between expense and capital, 201 of the 216 disputed expenditures were improperly treated as costs of production (Jul. Tr. 77-119).

In support of their theory of the case, the appellees presented four accounting experts: Richard Baker, a partner in the accounting firm of Ernst & Ernst, Hanna's auditors (Jul. Tr. 155); Bruce F. Smith and Maurice Peloubet, partners in the accounting firm of Price, Waterhouse & Co. (Jul. Tr. 198, 215); and John W. Queenan, a partner in the accounting firm of Haskins & Sells (Jul. Tr. 229). As the district court noted in its opinion, the testimony of these accountants "was largely cumulative" (R. 384). They testified that they had reviewed the contract together as a team and had come to the conclusion that generally accepted accounting practice in the smelting industry was intended to govern the accounting treatment of the 216 disputed items (e.g., Jul. Tr. 158-164, 221). In their opinion, under accounting practices peculiar to the smelting industry, each of the 216 disputed items was correctly treated

as a cost of production rather than as a capital expenditure.[26] Hanna's witnesses did not testify as to the result that would obtain if generally accepted accounting practice -- and not merely generally accepted accounting practices employed in the smelting industry -- were found to be applicable. Thus, the testimony of Dr. Wright as to how the items would be treated under generally accepted accounting principles was not challenged by Hanna's expert witnesses.

4. The District Court Decision.

Following the second trial, the district court entered two opinions (R. 375, 465).[27] The court held that "the terms in Article VI, paragraph 1, are ambiguous, and that other provisions relied on by the Government do not resolve the ambiguity" (R. 383). The court then concluded that the words "replacement" and "improvement" as used in Article VI of the contract "are terms of accounting art," and that, "in determining how to account for a particular item, an accountant must look beyond the contract and rely on generally accepted accounting principles and practices" (R. 384). After summarizing the testimony of the

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26/ The testimony of these expert witnesses will be more fully discussed infra.

27/ In the second, or supplemental, opinion, the district judge stated that both opinions "shall constitute my findings of fact and conclusions of law" under Rule 52(a), F.R. Civ. P. (R. 467).

various accounting experts, the court then stated "in my opinion, the parties intended to apply accounting practices common to the smelting industry" in determining whether the disputed items should be treated as costs of production (R. 387). Thus, the court adopted Hanna's principal defense that, notwithstanding the language of Article VI, paragraph 1, classifying all replacements and improvements to the Facility as capital items, only those replacements or improvements which are treated as capital expenditures under accounting principles in the smelting industry were to be treated as capital items under the contract.

The court below rejected two theories advanced by Hanna (through its accounting experts) to justify charging two classes of items to costs of production. The first class consisted of 61 items, each costing under $1,000 (but costing in total $34,113.79) which had been expensed as de minimis. The court found that since Hanna "had not routinely followed this practice and had capitalized many items costing less than $1,000, * * * the Company cannot now rely on a practice which it did not consistently employ" (R. 388).[28/] The second class consisted of six items acquired by Hanna in 1960 and 1961 at a

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28/ Because Hanna's witnesses had testified that, in their opinion, the expensing of many of these items could be justified under one or more of the other practices permitted by the court, Hanna was given the opportunity "to reclassify any such items" (R. 388). In its supplemental opinion, the Court upheld the reclassification of 27 items costing a total of $15,915.52 into "approved categories" and the Government conceded that 2 other minor items costing $1,801.89 were properly costs of production (R. 466).

cost of $215,110. According to Hanna's witnesses, these items had been expensed on the theory that the savings to the Government on the price of nickel resulting from their installation promised to exceed their cost, and because Hanna would have been unable to recover their cost in the amortization element of the contract price had they been capitalized (R. 389). These items, the court below stressed, "the Company's witnesses frankly admit to be capital items under the accounting practices previously discussed" (R. 388). Accordingly, the court held that Hanna had improperly treated those two classes of expenditures as expenses, and that the United States was entitled to reimbursement for them.

Alternatively, the court held that: "[W]ith two exceptions, the Government is estopped by acquiescence from asserting any claim for expenditures made after January 1, 1958. This estoppel does not apply to the six items expensed in 1960 and 1961 solely to obtain reimbursement * * * [nor] to those miscellaneous items (under $1,000) whose expensing cannot otherwise be justified" (R. 390). The court found that the Government since 1957 knew of the accounting practices principally in dispute but failed to complain about them until July 1961 when it questioned $210,605 expensed in 1960 (R. 390, 394). With respect to the Government's argument that, even if estoppel were applicable in a case of this sort, one of the necessary elements of estoppel would be lacking because Hanna had not changed its position in reliance on the silence, the court held (R. 390-391):

> Where acquiescence is the ground for estoppel, there is no occasion for the party who claims the estoppel to change his position; he "relies" by continuing his established practice. Mahoning Investment Co. v. United States, 3 F. Supp. 622 (Ct. Cl. 1933), cert. denied, 291 U.S. 675 (1934).

On the Government's count for reformation of the contract, the court held that since Hanna Smelting had -- as previously found -- erroneously expensed a number of items during 1959 and 1960 (see pp. 25-26, supra), the 58.77 cents per pound ceiling price should be reformed to reflect the deletion of these items from costs of production (R. 395-396).

In its supplemental opinion, the district court accepted the reclassification by Hanna of a number of items (see footnote 28, supra, p. 25) and also awarded the Government 6% interest on the overpayments on the items found not properly charged as costs of production, finding this "a classic case of unjust enrichment" (R. 467).

The final judgment of the court, entered on April 27, 1966, awarded the United States the total amount of $560,632.89, broken down as follows (R. 468-469):

(a)	6 major items improperly charged to costs of production	$215,110.00
(b)	32 minor disputed items improperly charged to costs of production	16,396.00
(c)	6% prejudgment interest on (a) and (b)	79,603.87
(d)	reformation of price downward by $.0124 per pound for 17,313,454 pounds of nickel, in accordance with the parties' 1964 termination agreement	214,686.83
(e)	reformation of price for 2,186,409 pounds of nickel	27,111.49
(f)	6% prejudgment interest on (e)	7,724.70
	Total award	$560,632.89

SPECIFICATION OF ERRORS RELIED UPON

1. The district court erred in interpreting the smelting contract as permitting Hanna Nickel Smelting Company to treat the expenditures for additions, modifications, replacements or improvements to the facility as reimbursable costs of production, rather than as non-reimbursable capital expenditures.

2. The district court erred in holding in the alternative that the Government is estopped to assert approximately $320,000 of its claim because its employees failed to object during the performance of the contract to the disputed accounting practices employed by Hanna Nickel Smelting Company.

3. The district court erred in failing to hold The Hanna Mining Company liable in full on its admitted guarantee of proper performance of the contract by its wholly owned subsidiary, Hanna Nickel Smelting Company.

SUMMARY OF ARGUMENT

I

A. The contract in dispute was, in large measure, a cost-reimbursement type contract, providing for the purchase of nickel by the Government at a price adequate to reimburse Hanna Nickel Smelting Company its cost of producing the metal, and providing a device for awarding the contractor a profit. There is, however, one essential feature that distinguishes this contract from the ordinary cost-reimbursement contract; that is the provision for Hanna to design, build, and equip the smelting facility and to make such replacements and improvements in it as were necessary, with up to $22,875,000

of the Government's money. In order to assure that the investment of public funds in the facility would be limited to that ceiling, and that the contractor would not pass on to the United States as reimbursable costs of production the cost of items which were capital in nature, the contract established its own cost accounting system. Under that system, Hanna was required to capitalize expenditures (a) "to test the process," (b) "to construct, equip, design and rebuild" the smelting facility, (c) "for such replacements or improvements" of the smelter which the parties agreed to be necessary or advisable, and (d) for such other items "which, in accordance with generally accepted accounting practice, are capitalized" (Article VI). Moreover, such capital expenditures could be made by Hanna from public funds only if the Government agreed that they should be made. Ibid. And, under that system, costs of production for which reimbursement would be made were defined as the costs and expenses of the contractor except those expenditures made for capital purposes.

It is the Government's position that each of the 216 expenditures in dispute in this litigation was improperly treated by Hanna as a reimbursable cost of production. For each expenditure was for an addition, modification, replacement, or improvement to the smelting facility which, under the contract cost accounting system, should have been treated as a capital expenditure subject to the Government's veto and to the overall contract ceiling on capital investment. The district court rejected this reading of the contract, concluding that the

contract's terms were "ambiguous", and, therefore, that external accounting standards -- and not the contract cost accounting system -- must be referred to in determining the proper accounting treatment for expenditures under the contract. The court then concluded that the parties intended to be applicable peculiar accounting practices used by some firms in the smelting industry -- for example, the practice of treating only the original investment in the smelting facility as a capital expenditure, and treating all subsequent expenditures for replacements and improvements to the facility as costs of production unless they materially increase the capabilities or value of the plant considered as a whole.

The standards adopted by the court below are wholly incompatible with the contract as it was written by the parties. The mere fact that the smelting contract is lengthy and its provisions complex was no reason for concluding that it was "ambiguous" and for ignoring its relevant terms. The result of reading the contract as requiring the application of smelting industry accounting practices is that whole sections of the contract are left entirely without meaning while others are emasculated. Thus, while the contractual language clearly calls for the capitalization of expenditures for "replacements" modifications, additions and "improvements", under the district court's holding, replacements and modifications may <u>never</u> be capitalized, while additions and improvements are rarely capitalized. As a result, Hanna has been permitted to charge to the Government, as ordinary expenses of production the cost

of huge pieces of equipment purchased for large sums of money and having useful lives of many years. The further result is that Hanna has received these pieces of equipment free, and at the time of the trial was still using more than one-half of them for the profitable commercial production of nickel.

B. Because the provisions of the smelting contract resulted from negotiations and bargaining between the parties, and not merely because some Government procurement manual required their inclusion in the contract, there is considerable evidence documenting the intent of the parties when they entered into the contract as to expenditures that would be capitalized and those that would be expensed. These documents show that the interpretation accorded the contract by the district court is wholly inconsistent with the parties' intent in 1953 when they entered into the contract. Indeed, the evidence shows that during negotiations Hanna did not even go so far as to suggest that accounting practices in the smelting industry should be the standard. Hanna's suggestion was only that it should be permitted to treat as reimbursable costs of production those expenditures which would under generally accepted accounting practices -- i.e., practices accepted in industry in general and not merely in some segment of the smelting industry -- be treated as costs of production, and that it should be allowed to capitalize those expenditures which would be capitalized under generally accepted accounting practice. But even this language, making the test of generally accepted accounting practice applicable, was not incorporated in

those established by the contract's own cost accounting system (with one minor exception, as to which generally accepted accounting practice was specifically made applicable).

C. There is also uncontradicted evidence showing that the Government insisted upon and was expressly given the right to veto expenditures by Hanna for additions, replacements, and improvements it deemed unnecessary or unadvisable. Nevertheless, the district court interpreted the contract to deprive the United States of its veto by approving Hanna's unilateral determination to expend Government funds for the disputed expenditures. The additional result is that the effective ceiling the United States set on the capital investment it would make in the smelting facility has been increased by the district court decision by almost $1,400,000.

D. In addition to the contemporaneous evidence of contract intent and the plain language of the contract indicating that the disputed expenditures should have been capitalized, the record further shows that, during the eight years Hanna performed the contract it frequently interpreted the contract as requiring the capitalization of expenditures virtually identical to those in dispute here. This evidence plainly dispels any doubt that Hanna seriously believed during contract performance that the disputed practices were consistent with the contract terms.

II

We believe the evidence discussed in Point I conclusively shows the proper interpretation of the contract and the errors

in the district court's interpretation of it; this Court need read no further. However, in the event the Court should feel that the parties must, despite that evidence, have contemplated the application of some external standard -- and not solely the contract cost accounting system -- to guide the determination of whether expenditures for additions, modifications, replacements, and improvements should be capitalized, the external standard is that of generally accepted accounting practice, the only external accounting standard referred to in the contract, and not accounting practice peculiar to the smelting industry. And, the uncontradicted evidence establishes that generally accepted accounting practice achieves virtually the same results as the contract cost accounting system. For under that standard, the Government would be entitled to recover $1,618,545, which is only $23,430 less than it would recover if the contract cost accounting system were held applicable.

III

One error of the court below especially highlights its failure to give any weight to the uncontroverted evidence. Among the disputed items charged by Hanna to costs of production was the expenditure of almost $199,000 in connection with the purchase and installation of new dust collection equipment. The district court held that Hanna properly treated this entire amount as a reimbursable cost of production, on the ground it represented the cost of

removing old equipment. The court thus wholly ignored the stipulation, contained in the record, between Hanna and the United States that at least $114,000 of the disputed amount was spent in purchasing the new equipment. It followed from this stipulation that even under the interpretation of the contract adopted by the court below, the $114,000 should have been capitalized.

IV

Also plainly wrong is the "alternative ground" of decision below that the United States is "estopped by acquiescence" from complaining about the expensing of some $320,000 of disputed expenditures. Here, the Government's auditors were--at worst--guilty of neglect of duty or lack of diligence in failing to discover sooner that Hanna was employing improper practices (or, if they had actually discovered the practices, in failing to make them known to their superiors); their lack of diligence resulted in silence, which at most constituted an implied acquiescence in the practices, or laches. Utah Power & Light Co. v. United States, 243 U.S. 389. Laches is, however, a defense that is not available against the United States. Ibid.

But even if the Government's conduct could be construed as something more than an implied acquiescence, and even if the Government could be estopped because of the acts or

omissions of its field agents (compare FCIC v. Merrill, 332 U.S. 380), the elements of the defense of estoppel are lacking here. For there was no misrepresentation or concealment of material facts, nor an intent or expectation by the United States that Hanna would act on the Government's silence, nor evidence that any responsible Government official had actual knowledge of the facts of Hanna's practices. Moreover, Hanna did not change its position as a result of the Government's silence. In short, there was no basis for a holding of estoppel.

ARGUMENT

I

THE CONTRACT PROVIDED ITS OWN SYSTEM OF ACCOUNTING WHICH CALLED FOR THE CAPITALIZATION OF EXPENDITURES FOR ADDITIONS, MODIFICATIONS, REPLACEMENTS AND IMPROVEMENTS TO THE SMELTING FACILITY; THE DISTRICT COURT ERRED IN HOLDING THAT THE CONTRACT CALLED FOR THEIR CAPITALIZATION ONLY WHEN REQUIRED BY ACCOUNTING THEORIES OF THE SMELTING INDUSTRY.

A. The Language of the Contract Plainly Calls for the Capitalization of Expenditures for Additions, Modifications, Replacements, and Improvements to the Smelting Facility.

One needs little expertise either in the fields of law or accounting to recognize that if in a contract the parties agree to establish a particular system of accounting for expenditures under the contract, that system must be followed in order to fulfill the agreement. The accounting experts presented by both parties here agreed on this point (see Jul. Tr. 33,280). This is especially true, the Government's expert emphasized, where the contract involved is a cost reimbursement type contract (Jul. Tr. 30-31); for in such a case, improper allocation of the contractor's costs to the particular contract will result in the Government paying a greater price for the work than it bargained for. 29/ It is the Government's position in this litigation

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29/ The Government's expert, Dr. Howard W. Wright, was only recently quoted by the Court of Claims on this point in Lockheed Aircraft Corp. v. United States, ____ F. 2d ____ (Ct. Cl. No. 143-64, decided April 14, 1967) and United States Steel Corp. v. [continued]

that the smelting contract established its own accounting system, under which expenditures for additions, modification, replacements and improvements to the smelting facility should be capitalized, and not treated as costs of production. The district court rejected this argument, concluding that the contract languag was ambiguous and, therefore, that external accounting principles and practices must be referred to in determining the proper accounting treatment of the disputed expenditures. Then, going one step further, the court concluded that, although not referred to in the contract, the parties intended to apply external practices common only to the smelting industry -- mainly a practice, peculiar to the smelting industry, of capitalizing expenditures for replacements or improvements of capital equipment only if they materially increase the capabilities or value of the plant considered as a whole.

We show first below that, contrary to the district court's conclusion, the contract is not "ambiguous". To be sure, the contract is a complex document because many of the provisions are interrelated, spelling out the dual roles played by the United

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29/ [continued] United States, 367 F. 2d 399, 409. In the Lockheed case, the court stated (Slip op., p. 9, n. 5):

> [O]ne must be cautious in using "generally accepted accounting principles" as an aid in determining the allocability of costs to government contracts. Such principles have been developed for asset valuation and income measurement, and "are not cost accounting principles" as such, although "cost accounting concepts * * * [may] evolve out of" them. Wright, Accounting for Defense Contracts 29 (1962). See Wright, The Theory of Cost Principles, 18 Fed. B.J. 165, 169 (1958).

States (banker-purchaser of nickel) and Hanna Smelting (borrower-seller of nickel). However, a careful reading of the relevant provisions makes clear the accounting system the parties contemplated on January 16, 1953, when they entered into the smelting contract. And under that system, all the disputed expenditures -- which were made for replacements, improvements, additions, and modifications to the smelting facility -- should have been capitalized. We then show that the trial court's contrary reading of the contract is plainly incompatible with the terms of the contract.

1. The Accounting System Established by the Contract.

Article IV of the contract defines and describes the smelting facility that Hanna Smelting was to erect with money advanced by the United States; in pertinent part it provides (Pl. Exh. 2, p. 2):

> With advances made by the Government as provided in Article VI, the Contractor will construct and equip (including any necessary redesigning, rebuilding and repair) as promptly as possible a facility for the conversion of ore from the Mine into saleable ferro-nickel. * * * [T]he facility shall consist of one electric refining furnace, two electric slag melting furnace, a slag-disposal site and equipment, a stockpile site and stockpiling equipment, a sewage-disposal plant, railroad spurs, housing for personnel, preliminary construction and foundations for two additional electric melting furnaces and facilities as may be required after Period 1, and all equipment and facilities agreed to by the Government as necessary for such conversion of ore from the Mine into saleable ferro-nickel. * * * The facility, as it exists from time to time as contemplated by this article or as it may be substituted for from time to time with the approval of the Government, is hereinafter called "the Facility".

The plain meaning of this provision is that, with advances furnished by the United States in accordance with Article VI, Hanna Smelting agreed to "construct and equip" a smelting facility "including any necessary redesigning, rebuilding and repair" of the facility. Because the parties did not know exactly the equipment that would be needed when they entered into the contract (see pp. 66-67, infra) they agreed that the facility would consist of the few described items of equipment and, additionally, "all equipment and facilities agreed to by the Government as necessary for such conversion of ore." This plant -- "as it exists from time to time as contemplated by this Article or as it may be substituted from time to time with the approval of the Government" -- is to be called "the Facility" throughout the remaining provisions of the contract.

Article VI of the contract stated the conditions on which "capital" and "working capital" advances would be made. With respect to capital advances, amended paragraph 1 of the article (supra, pp.6-7) provided:

> Upon the Contractor's written request, the Government will make advances (hereinafter called "Capital Advances") of the entire amount up to a total of $22,875,000 (including the amount to be reimbursed to the Contractor under Article II) required
>
> (a) to test the process as provided in Article II, including the cost of mining and of shipping to France the quantity of ore from the Mine required for such tests on behalf of the Contractor,
>
> (b) to construct, equip, design and rebuild the Facility contemplated by Article

IV (including all costs and expenses incurred during or in respect of any periods of time within Period 1 that production of saleable ferro-nickel has ceased by reason of constructing, equipping, designing, rebuilding or repairing the furnaces or related equipment),

(c) for such replacements or improvements of the Facility which are agreed by the Contractor and the Government to be necessary or advisable during the period of this Contract, and

(d) for such other necessary and so agreed upon expenditures which, in accordance with generally accepted accounting practice, are capitalized. 30/

As for working capital advances, paragraph 2 of Article VI, provided (supra, p. 7):

> Upon the Contractor's written request from time to time * * * the Government will advance to the Contractor sums (hereinafter called "Working Capital Advances") representing its reasonable minimum working capital requirements so long as the sum of such request plus Working Capital Advances then outstanding does not exceed $3,750,000. * * * Working Capital Advances may be requested and used by the Contractor to pay any costs and expenses hereunder of the Contractor, including costs arising from the payment of tax liability or other source, not covered by Capital Advances and which are in excess of funds then available from the sale hereunder of ferro-nickel at the prices herein set forth [emphasis added].

Article VI also emphasized that capital advances and working capital advances were each to have their own, distinct purpose and were not to be intermingled by further providing (Pl. Exh. 1, p. 5):

30/ In the contract, clauses (a) through (d) are not tabulated; however, for ease in understanding, we have set them out above in separate paragraphs.

3. Capital Advances and Working Capital Advances shall be kept in separate accounts at a bank or banks approved by the Government; [and] shall not be commingled with each other or with other funds; * * * .

The language of Articles IV and VI makes clear that the provisions must be read together. For example, Article IV expressly states that Hanna Smelting should construct and equip the facility "with advances made by the Government as provided in Article VI." (Emphasis added). Similarly, clause (c) of paragraph 1, Article VI, states that capital advances would be made as required by Hanna "for such replacements or improvements of the Facility"; and "the Facility" had already been defined in Article IV of the contract as consisting of the specifically described equipment "and all equipment and facilities agreed to by the Government as necessary for such conversion of ore * * * ."

Reading the two articles together -- substituting the definition of "the Facility" in Article IV for the term "the Facility" in Article VI, paragraph 1, clauses (b) and (c) -- it becomes apparent that capital advances were to be made to Hanna Smelting:

(b) to construct, equip, design and rebuild the specifically described equipment 31/ and all equipment and facilities agreed to by the Government as necessary for such conversion of ore, and

(c) for such replacements or improvements of the specifically described equipment and all equipment and facilities agreed to by the Government as necessary for such conversion of ore, which are agreed by the Government to be necessary or advisable during the period of this Contract.

31/ We have used the term "the specifically described equipment" rather than itemize the particularly described items in Article IV

The parties thus agreed in clause (b) that capital advances would be made upon Hanna's written request to cover expenditures to construct, equip, design, or rebuild any of the specifically described equipment or any of the additional equipment and facilities agreed to by the Government to be necessary or advisable during the period of the contract. In clause (c) the parties agreed that capital advances would also be made at Hanna's written request to cover expenditures for a replacement or an improvement (which was agreed to by the Government as necessary or advisable during the period of the contract) of a specifically described item of equipment, or for additional equipment and facilities agreed to by the Government as necessary for the conversion of ore. Under the accounting system contemplated by the contract, an expenditure for the replacement of a component -- rather than the entire unit -- of a specifically described item of equipment (or of an item not specifically described but agreed to by the Government) would not be covered by capital advances because it would not be an expenditure for the replacement of a specifically described item of equipment (or for the replacement of an item not specifically described but nevertheless agreed to by the Government as necessary or advisable). On the other hand, if the replacement of a component of an item effected an improvement in the item, it would be covered by capital advances under clause (c) because it would then be an expenditure for improvement of an item of equipment as specifically described or of an item added with the Government's agreement. An example of an expenditure for a "replacement" which

would not be covered by capital advances would be the purchase of a new light bulb to replace a worn one in a lighting fixture in the plant. Since the new bulb merely replaced a component of an item -- the lighting fixture -- it would not be capitalized.

Working capital advances, on the other hand, were to be "used by the contractor to pay any costs and expenses hereunder of the Contractor * * * not covered by Capital Advances" (Article VI, paragraph 2, emphasis added). The plain significance of this provision is that if an expenditure came within the compass of the capital advance provision, it could not be paid for with working capital advances. For example, if Hanna Smelting wished to purchase a tractor for the facility, it would be entitled under clause (b), paragraph 1, Article VI, to purchase the tractor with capital advances -- provided the Government agreed the item of equipment was necessary for the conversion of ore and the capital advance ceiling had not been exceeded. Hanna could not under the contract avoid the need to obtain the Government's approval to the purchase of the tractor by using working capital advances because the expenditure would be "covered by Capital Advances"; therefore, it would not come within the purposes for which working capital advances could be used. Similarly, if Hanna properly followed the contract and purchased the tractor with capital advances, it could replace the tractor with a new one by using capital advances, provided the Government agreed the replacement was "necessary or advisable". Here again, it could not sidestep the requirement of obtaining governmental approval by purchasing the replacement tractor with working capital advances.

The discussion to this point related to the provisions dealing with the banker-borrower relationship. There was, in addition, the seller-purchaser relationship between the parties. As previously mentioned (see pp. 8-9 , supra), Hanna was to sell smelted nickel to the United States at a price designed to reimburse it for its "actual cost of production per pound of contained nickel" (Article VIII).[32/] "The Contractor's actual cost of production" was defined, as here relevant, as all "unrecovered costs and expenses hereunder of the Contractor * * * not covered by Capital Advances and which arise from operations * * * ." Thus, if an expenditure were "covered by Capital Advances" -- i.e., if the contract required capital advance rather than working capital advance treatment of the expenditure -- it could not be treated as part of Hanna's "actual cost of production" for which reimbursement by the United States would be made. In short, if an expenditure came within the capital advance language of the contract, it could not be covered with working capital advances and thereafter treated as a reimbursable actual cost of production.

All but one of the 216 items of disputed expenditures in this litigation, costing a total of $1,392,376.55, were covered

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32/ In accordance with the contract, Hanna Smelting would submit an invoice to the Government charging it for delivered metal at the agreed price per pound. Deducted from the invoice price was an amount known as the "amortization payment" -- an amount calculated to amortize over the first 95,000,000 pounds delivered the capital advances made by the United States during the contract term (see Article VIII, supra, p. 8).

by the language of the capital advance article.[33] As Plaintiff's Exhibit 90 demonstrates, these expenditures were all for additions, modifications, replacements, or improvements. Because of our understanding of the appellees' position in the court below to be that if the Government's interpretation of the contract (as outlined above) is correct, then the United States is entitled to recover all these disputed amounts, we will not pursue the matter further in this brief.[34] If the court adopts the interpretation we have suggested above, then the Government should be awarded the total amount of $1,392,377.00 plus interest (rather than only the $231,506 plus interest awarded by the court below to cover the six major and thirty-two minor disputed items held improperly charged to costs of production). In addition, the Government's recovery on reformation of the contract should be increased by $ 7,800 to reflect the taking out of costs of production

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33/ The one item not covered by the capital advance language is item 77, a bonus of $1,192.48 paid to a Bechtel Company superintendent. Hanna nevertheless improperly obtained reimbursement from the United States for this expenditure. The agreed description of this item in Pl. Exh. 82 indicates that there was "no contractual obligation to make this payment." If Hanna wished to reward a Bechtel employee for meritorious service it was, of course, free to do so. A contractor with the United States under a cost reimbursement contract may not, however, dispense gratuities and then pass their cost on to the public. Cf. Hotpoint, Inc. v. United States, 117 F. Supp. 572, 575-576 (Ct. Cl.) in which the court prohibited a cost-plus contractor from obtaining reimbursement from the Government for charitable contributions.

34/ In Defendant's Brief after Second Trial filed in the court below, appellees stated (at p. 6) that if "the Government's construction prevails it is quite clear that most if not all of the disputed items were in a sense literally additions or replacements or improvements."

during 1959 and 1960 of the various disputed expenditures erroneously charged to costs of production in those years.

2. The District Court's Reading of the Smelting Contract Is Wholly Incompatible with its Terms.

The district court rejected the interpretation of the contract we have suggested above, concluding that "the terms in Article VI, paragraph 1, are ambiguous, and that other provisions relied on by the Government do not resolve the ambiguity" (R. 383). The court then denied the major portion of the Government's claim on the basis of its conclusion that "the parties intended to apply accounting practices common to the smelting industry in determining whether the disputed items should be treated as costs of production" (R. 387). "Under these practices", the court state, "replacements or improvements, even if long-lived are expensed unless they materially increase the capabilities as value of the plant considered as a whole" (R. 386). Hanna's failure to capitalize another substantial group of expenditures, representing the cost of additions of long-lived pieces of equipment to the smelting facility and of modifications to then existing equipment, was also upheld on the ground that Hanna Smelting "reasonably and properly employed accounting practices which reflect the experimental nature of this smelter" (R. 387).[35/]

35/ Concerning this practice, Hanna's accounting witnesses had testified (R. 386):

> [W]hen an inadequate item is replaced or rebuilt in an experimental operation, the cost of modification, and in some cases the cost of new equipment, is [continued]

Hanna's treatment of another group of expenditures as costs of production was upheld by the court below under an accounting practice called the "receding face theory." 36/ While the district court did not specifically state that this theory was one of the "accounting practices common to the smelting industry" which it believed the parties intended, that obviously was the primary reason for the court's holding the theory applicable; for the district court pointed out that these expenditures "did not increase the capacity of the plant, but only enabled it to continue operations," just as the expenditures for replacements and improvements were held properly expensed because they did not "materially increase the capabilities or value of the plant considered as a whole" (R. 387, 386).

Application by the district court of "accounting principles peculiar to the smelting industry" (including the receding face

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35/ [continued]
properly expensed when the modification adds no "essential value" to the plant. In their opinion, the modifications expensed by the Company enabled the smelter to achieve its originally designed capacity and added no essential value to it.

36/ More specifically, the district court stated (R. 387):

> The Company's witnesses relied on this theory to justify expensing $91,873.96 spent primarily to extend slag disposal facilities. The receding face theory was developed in mine accounting; it permits expensing the costs of improvements needed to reach and work the receding face of a mine. In a smelting operation, slag and other waste are stored in piles, and it is necessary continually to extend the dumping facilities over the growing piles. The witnesses testified that the new facilities did not increase the capacity of the plant, but only enabled it to continue operations. [Emphasis added.]

theory) and "accounting practices which reflect the experimental nature of this smelter" to justify the expensing of otherwise capital expenditures is wholly incompatible with the contract written by the parties. The plain language indicates that the parties contemplated that expenditures for additions, replacements, improvements, and modifications would be capitalized -- i.e., covered by capital advances. While the contract terms are complex, they are not "ambiguous"; and, in concluding that the contract was ambiguous and that Hanna's treatment of the disputed expenditures was reasonable and proper, the district court simply ignored much of the language used by the parties. See United States v. Dwyer Lumber & Plywood Co., 353 F. 2d 351 (C.A. 9), in which this Court reversed this same district court for having committed similar errors. In addition, the result of the application of the principles and practices by the court below is that there are virtually no such expenditures that must be capitalized. This interpretation leaves significant clauses of the contract virtually without meaning.

a. Article VI, paragraph 1, clause (c) (supra, pp. 6-7), provided that capital advances would cover expenditures "for such replacements or improvements of the Facility which are agreed by the Contractor and the Government to be necessary or advisable during the period of this Contract." The parties thus plainly expected that there would be expenditures for "replacements or improvements" which would have to be capitalized. The court below concluded that the parties intended the question of whether to capitalize or expense expenditures for "replacements

or improvements" to be governed by smelting industry accounting practice (R. 387). But under this practice "replacements or improvements, even if long-lived, are not expensed unless they materially increase the capabilities or value of the plant considered as a whole" (R. 387).[37/] The difference between this practice and accounting practices in industry in general (let alone the practices contemplated by the contract) is great. For example, if a spinning machine in a clothing factory or a stamping maching in an automobile factory is replaced with a new machine -- whether of the same kind or of an improved kind -- the expenditure for the new item would be capitalized under generally accepted accounting principles and practices (and then depreciated over the useful life of the machine). Hanna's experts so recognized (Jul. Tr. 204, quoted infra, p. 81). Under the smelting industry theory, the entire smelter is treated as a "single capital unit"; the replacement of one long-lived piece of equipment with another is expensed, even though the new unit generates profits over many ensuing accounting periods; and the installation of improved equipment is almost always expensed because rarely will an improved piece of equipment materially increase the value or capabilities of the smelter as a whole.

Thus, under the court's conclusion that smelting industry practices were intended, an expenditure for a "replacement" would

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37/ Significantly, while appellees' witnesses testified that this practice is "generally accepted in the smelting industry" they did not testify that the practice is employed by all firms in the smelting industry or for that matter by even the greater proportion of the industry, and the district court did not so find.

never be capitalized, but would always be treated as a cost of production. For the replacement of a unit of equipment in the smelting facility with a new unit of the same kind (for example, the replacement of a worn ladle with a similar ladle) could not possibly, in the language of the district court, "materially increase the capabilities or value of the plant considered as a whole" (R. 386). Similarly, expenditures for "improvements" would almost never be capitalized, since few, if any, improvements (even those costing many thousands of dollars and having useful lives of 15 to 20 or more years) in and of themselves affect the capacity of the plant as a whole.

A striking example of the type of expenditures the court believed should be expensed and not capitalized is furnished by Hanna's purchase in 1957 of two dutch ovens (see pp. 15-16, supra) at a cost of almost $97,000. Taking words in their normal meaning, the ovens were clearly both "replacements" and "improvements". For they replaced earlier ovens, and had a heating capacity double those they replaced (Pl. Exh. 82). And they had a useful life of 20 years (Pl. Exh. 166). Yet under the district court's ruling they were not improvements or replacements which had to be capitalized.

By reading into the contract that the parties intended expenditures for replacements and improvements to the smelting facility to be capitalized only if those expenditures were required to be capitalized under accounting practice in the smelting industry, the district court has virtually read out of the

contract clause (c), paragraph 1 of Article VI -- that capital advances would cover expenditures for replacements and improvements. The additional result is that Hanna has received free of charge many pieces of equipment which it has continued to use since the termination of the smelting contract in the extremely profitable commercial production of nickel. Indeed, the uncontradicted evidence is that at the time this case was being litigated in the court below, Hanna was still using disputed items which had cost a total of $715,859 -- or considerably more than one-half of the total dollar value ($1,392,377) of the disputed items -- for the commercial production of nickel (see Pl. Exh. 72).[37a/]

b. The court's approval of Hanna's expensing (rather than capitalizing) expenditures for additions and modifications because of an accounting practice which permits such treatment in the case of an experimental venture is similarly incompatible with the contract terms. As previously mentioned (supra, p. 6), Article VI, paragraph 1, clause (b), provided that capital advances would be made "to construct, equip, design and rebuild the Facility contemplated by Article IV * * *," and Article IV provided in pertinent part, supra, pp. 5-6:

37a/ To further aid the Court's understanding of the nature of the disputed items, we will submit prior to oral argument three copies of a document containing the agreed descriptions of each of the items that was still in use by Hanna (adapted from Pl. Exhs. 82 and 72) together with photographs of each such item (adapted from Pl. Exh. 83).

> With advances made by the Government as provided in Article VI, the Contractor will construct and equip (including any necessary redesigning, rebuilding and repair) * * * a facility for the conversion of ore from the mine into saleable ferro-nickel. * * * [T]he facility shall consist of * * * [the specifically described items of equipment such as one electric refining furnace], and all equipment and facilities agreed to by the Government as necessary for such conversion of ore from the mine into saleable ferro-nickel. * * * The facility, as it exists from time to time as contemplated by this Article or as it may be substituted from time to time with the approval of the Government is hereinafter called "the Facility". [Emphasis added.]

Under these provisions, capital advances were available for all additional equipment and facilities agreed to by the Government, and "to * * * rebuild the Facility" (i.e., for modifications). Despite this language, the court concluded that the cost of additions and rebuilding is properly expensed when the expenditure adds no "essential value" to the plant (R. 386). It is obvious

that almost no addition or modification adds "essential value" to the plant -- not even those costing many thousands of dollars such as some of the expenditures in dispute here -- and therefore almost no such expenditures would ever be capitalized. That result is plainly contrary to the language of the contract.

B. The History of Contract Negotiations Show that the Parties Deliberately Decided that Expenditure Such as those in Dispute Should be Capitalized Without Reference to Accounting Practices in the Smelting Industry, and that the Government Would Have a Veto Over the Expenditure of Public Funds for Additions, Replacements and Improvements.

The smelting contract is not a standard-form Government contract containing the usual clauses insisted upon by the United States on a take-it-or-leave-it basis. Instead, this contract resulted from extensive negotiations and bargaining between representatives of the Hanna companies and the Defense Materials Procurement Agency; moreover, much of the contract language was proposed by Hanna. A number of exhibits in evidence document those negotiations. They show that the district court's reading of the contract is entirely inconsistent with the intent of the parties as documented by their negotiations and bargaining. The exhibits further show -- ironically -- that the court's interpretation is, however, consistent with the contract language originally proposed by Hanna and specifically excluded from the contract at the Government's insistence.

The Government's initial discussion drafts of the contract, dated October 13, 1952, made no mention of "generally accepted

accounting practice" or of "generally accepted accounting practice in the smelting industry" [38] (see Pl. Exhs. 176, 177). [39] The draft provided for advances of up to $20 million for "the design, acquisition, installation and necessary rebuilding or modification of the facilities constructed under Article I * * * " (Pl. Exh. 177, p. 11). And the suggested definition of the smelting facility required Hanna to provide specifically enumerated items of equipment "together with all related equipment and facilities required to satisfy its obligations hereunder" (id. p. 2) -- again, no mention of generally accepted accounting practice.

Hanna's initial draft of the smelting contract (Pl. Exh. 138), dated November 24, 1952, contains the first mention of the term "generally accepted accounting practice." Significantly, not even that draft speaks in terms of "generally accepted accounting practice in the smelting industry." The "Capital Advances" article of Hanna's proposal provided for advances of up to a total of $20 million (Pl. Exh. 138, p. 6):

> (a) to construct, equip, design, rebuild and repair the Facility contemplated by Article III, and (b) for such replacements, additions, or improvements of the Facility which are deemed necessary or advisable by the Contractor during the period of this Contract and which, in accordance with generally accepted accounting practice, are capitalized. [Emphasis added.]

38/ As mentioned above (see pp. 50-51, supra), there is a great difference between generally accepted accounting practice and generally accepted accouting practice in the smelting industry

39/ Both exhibits are dated October 13, 1952; Pl. Exh. 177 is merely a "revised draft" of Pl. Exh. 176.

The provision of Hanna's draft defining "the Facility" provided (Pl. Exh. 138, p. 3-4).

> With advances made by the Government as provided in Article V, the Contractor will construct and equip (including any necessary redesigning, rebuilding and repair) as promptly as possible a facility for the conversion of ore from the Mine into saleable ferro-nickel, which * * * shall consist of * * * [specifically described items of equipment, such as one electric refining furnace, one electric smelter furnace, etc.], all equipment and facilities deemed by the Contractor necessary or convenient for such conversion, and any necessary or convenient licenses, easements or other rights * * *. [Emphasis added.]

Hanna's draft of November 24, 1952, also contained a price structure similar to the one in the contract as executed. It provided that Hanna would be paid for nickel based on its "actual cost of production per pound of contained nickel" (Pl. Exh. 138, p. 9), and proposed the following definition of "cost of production" (Pl. Exh. 140, p. 2):

> "Cost of Production" shall mean all costs and expenditures incurred (other than items of Capital Cost) from the beginning of Period 1 for the production of ferro-nickel as herein contemplated which, in accordance with generally accepted accounting principles, are considered as production costs, including but without limitation thereto, royalties, management and consultant fees, salaries, wages and bonuses, state and local taxes, insurance, interest on working capital, advances and any carry-forward of net operating losses in excess of the ceiling prices fixed and adjusted as in this Contract provided. [Emphasis added.]

The Government's negotiators objected to these provisions. One of the Government's negotiators stated in a memorandum to

his superior (Deft. Exh. 118, pp. 1-2):

> The language used in this article allows the Contractor to construct or provide any facilities that he wishes. Obviously there must be some check on this by the Government. At the end of the third line on page 4 of the draft the addition of the words "and agreed to by the Government as" will satisfy to this requirement
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> * * * * *
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> It will obviously be necessary to eliminate the capitalization of repairs, although the capitalization of rebuilding is satisfactory, and further, replacements, etc. deemed necessary or advisable by the Contractor must be agreed to by the Government.

Similarly, the attorney for the Defense Materials Procurement Agency who reviewed Hanna's draft wrote in a memorandum to the General Counsel of the agency (Deft. Exh. 120, p. 1):

> In Article V, Advances, repairs should not be charged to advances (p. 6), and the Government should have power to approve "necessary or advisable" expenditures by Contractor.

The contract actually executed did not give Hanna Smelting the unfettered discretion it had sought to determine what additional equipment (that is, what equipment in addition to the items specifically mentioned in Article IV) would go into the facility at Government expense. The contract did not provide that capital advances would cover "such * * * additions * * * which are deemed necessary or advisable by the Contractor," as Hanna had proposed (Pl. Exh. 138, p. 6). Instead, the final contract provided for capital advances "to construct, equip, design and rebuild the facility contemplated by Article IV," and "the Facility" was to consist of specific equipment

"and all equipment and facilities agreed to by the Government as necessary for such conversion of ore" (Articles VI and IV). In short, to satisfy the United States' objections to Hanna's drafts, additional equipment was not to be acquired with public funds unless "agreed to by the Government as necessary." The contract did, however, adopt the wording proposed by Hanna Smelting that capital advances would be used for, among other things, "to * * * rebuild * * * the Facility."

On a similar note, the Government rejected the language suggested by Hanna that capital advances would be available "for such replacements, additions, or improvements of the Facility which are deemed necessary or advisable by the Contractor * * * and which, in accordance with generally accepted accounting practice, are capitalized" (Pl. Exh. 138, p. 6). In the contract as executed, the phrase "which, in accordance with generally accepted accounting practice, are capitalized" does not modify the clause dealing with replacements and improvements. And "replacements and improvements" may be made only if "agreed by the Contractor and the Government to be necessary or advisable." Thus, Article VI, paragraph 1, provides that Capital Advances cover expenditures (supra, pp. 6-7):

> (a) to test the process as provided in Article II, * * *, (b) to construct, equip, design and rebuild the Facility contemplated by Article IV * * *, (c) for such replacements or improvements of the Facility which are agreed by the Contractor and the Government to be necessary or advisable during the period of this Contract, and (d) for such other necessary and so agreed upon expenditures which, in accordance with generally accepted accounting practice, are capitalized.

Under plain rules of English grammar, the phrase "which, in accordance with generally accepted accounting practice, are capitalized" modifies only "for such other necessary and so agreed upon expenditures"; the phrase does not also modify clause (c), as appellees urged below and as the district court apparently believed.

Finally, Hanna's proposal (supra, p. 55) that cost of production "shall mean all costs and expenditures incurred * * * which, in accordance with generally accepted accounting principles, are considered as production costs * * * " (Pl. Exh. 140, p. 2) does not appear in the final contract. Instead, "cost of production" is defined as all "costs and expenses hereunder of the Contractor * * * not covered by Capital Advances and which arise from operations * * * " (supra, p. 8), with no mention being made of "generally accepted accounting practice."

The record does not affirmatively indicate why the definition in Hanna's drafts which would have provided capital advance treatment only for those "replacement[s], additions, or improvements * * * which, in accordance with generally accepted accounting practice, are capitalized" was rejected. Neither does the record indicate why cost of production was not defined, as Hanna had suggested, to mean "all costs and expenditures incurred * * * which, in accordance with generally accepted accounting principles, are considered as production costs." The

fact is, however, that the contract as entered into by the parties does not make "generally accepted accounting practice" the test of whether expenditures for "replacements or improvements" are to be capitalized. And it certainly did not make "generally accepted accounting practice in the smelting industry" the standard. Rather, it provided for a system of accounting calling for the capitalization of additions, modifications, replacements or improvements, a system close to but not identical with, generally accepted accounting practice. See infra, p. 77-81. Considering that even the provisions suggested by Hanna which would have made "generally accepted accounting practice" the standard are not contained in the contract, the court's conclusion that "generally accepted accounting practice in the smelting industry" was intended is plainly erroneous.

C. The District Court's Interpretation of the Contract Deprives the Government of its Right To Veto Capital Expenditures, and Permits Hanna Smelting To Avoid the Ceiling on Such Expenditures.

We have shown above that the district court's interpretation of the contract is contrary to the contract terms and the intent of the parties as evidenced by the history of contract negotiations. We now show that application of "accounting practices peculiar to the smelting industry" and accounting practices which the court held applicable because of the experimental nature of the smelter deprive the United States of its contract right to veto expenditures for additions, replacements, or improvements. The district court's interpretation of the contract also completely overrides the understanding of the parties that the Government would pay no more for capital items than the $22,300,000 of capital advances authorized and approved.

1. The contract as executed (Article VI, paragraph 1, clause (c)) provided capital advance coverage "for such replacements or improvements of the Facility which are agreed by the Contractor and the Government to be necessary or advisable." We have shown (pp. 56-58 , supra) that the parties agreed to confer this veto power over expenditures for "replacements and improvements" despite Hanna's initial proposals that would have allowed it unilaterally to determine whether expenditures for replacements or improvements should be made. The district court, by concluding that the parties intended expenditures for replacements or improvements to be capitalized only

if they would be capitalized under smelting industry accounting practice, has read the veto out of the contract. For, as previously discussed (see pp. 44-45 , supra), Hanna was permitted to incur at Government expense costs of production without the Government's approval, and, under the district court's interpretation, the disputed expenditures for all replacements and virtually all improvements were properly treated as costs of production. In this manner, the court below approved Hanna's having deprived the United States of its veto over such expenditures.

Similarly, the court's conclusion that expenditures for additional equipment for the smelting facility were properly expensed (and not capitalized) because of the experimental nature of the smelter deprives the Government of its contract right to veto such expenditures. It should be recalled (see p 5, supra) that under Article IV Hanna was to equip the Facility with the specifically described items of equipment and all additional "equipment and facilities agreed to by the Government as necessary for such conversion of ore." This veto over expenditures for additions, the evidence of contract negotiations demonstrates (see pp. 57-58 , supra), was also inserted in the contract over Hanna's initial objections. Here again, the court below read the veto out of the contract by concluding that, because the smelter was experimental, additions could be expensed -- and the need for obtaining Government

approval avoided -- if they did not add "essential value" to the smelter. Of course, the court found no addition as meeting that test of adding "essential value" despite the fact that many of them cost thousands of dollars and were expected to, and did, benefit many years of Hanna's commercial operations of the smelter. See Pl. Exh. 72 and pp. 52-53, supra.

2. Apart from depriving the United States of its express contract right to veto expenditures for additions, replacements, and improvements, the district court's interpretation of the contract nullifies the understanding of the parties when they entered into the contract that the United States would not pay for capital expenditures beyond the amount of capital advances requested and authorized. As we have noted (supra, p. 6), the contract set a fixed ceiling on the capital investment the Government would make in the smelting facility. That ceiling, originally set at $22 million, was increased at Hanna's request to $22,875,000. The contract did not, however, set a fixed ceiling on costs of production that would be borne by the public Treasury.[40/] By not requesting and using capital advances for the $1.4 million in dispute here, Hanna not only deprived the Government of its veto over such expenditures but also caused the Government to pay for capital expenditures beyond its commitment to the extent of those expenditures. For the

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40/ The contract, however, did set a ceiling price per pound on costs of production. That price per pound was changed from time to time; and, with a minor exception, Hanna was able to stay within that limit during the term of the contract; moreover, Hanna recouped costs above the ceiling when it subsequently produced nickel under the ceiling price. Thus Hanna was reimbursed in full for all its costs of production.

contract provided that "upon the Contractor's written request, the Government will make" capital advances "up to a total of $22,875,000" (supra, p. 6); however, capital advances of slightly less than that amount, totalling $22,300,000, were requested, approved, and advanced (R. 298). Accordingly, although the Government thus committed itself to a capital investment of no more than $22,300,000, Hanna caused the Government to make an additional capital investment of almost $1.4 million by charging capital expenditures to costs of production. The result is that public funds were used to purchase equipment which Hanna never paid for,[41/] but which Hanna obtained free and used in the commercial production of nickel. This result reached by the court below is plainly incompatible with the contract.

D. During the Eight Years it Performed the Contract, Hanna Smelting Interpreted it as Requiring the Capitalization of Numerous Expenditures for Additions, Modifications, Replacements, and Improvements Which Are Virtually Identical to the Expenditures it Now Claims Should Not Be Capitalized.

In addition to the contractual language and the history of the negotiations, which we have considered to this point, during contract performance Hanna Smelting sought to capitalize numerous expenditures for additions, modifications, replacements, and

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41/ The contract gave Hanna the right to purchase the whole smelting facility at 7 1/2% of the capital expenditures. Hanna of course exercised that right (see supra, p. 9). But since the disputed items were not included in the capital expenditures, it received them free.

improvements which would not be capitalized under the theories advanced by Hanna in this litigation and held applicable by the district court. Surely, had it been Hanna's original interpretation of the contract that the "single capital unit", the "receding face" and the "experimental nature of the smelter" theories applied, it would also have attempted to treat those expenditures as costs of production (and thereby avoid the Government's veto and the ceiling on capital expenditures).

1. The record shows in this connection that on April 7, 1953, less than three months after the smelting contract was executed, L. W. Spang, -- who is an attorney, and was the Secretary of Hanna Nickel Smelting Company, and was one of its primary contract negotiators [42] -- wrote Messrs. Humphrey and Pierce of Hanna's Cleveland office [43] as follows (Pl. Exh. 42, p. 2):

> I am clearly of the opinion that under those provisions [Articles IV and VI, paragraph 1] the Government is firmly committed up to $20,000,000, subject only to its right to agree with us what facilities are required, in addition to those specified in the Contract, to produce the quantity of ferronickel called for. * * * [Emphasis added.]

Thus, in the early days of contractual performance, a high official -- one who had a great deal to do with drafting the

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42/ See R. 212 and Oct. Tr. 25.

43/ While that letter does not state the titles of Messrs. Humphrey and Pierce, the stipulated facts indicate that both gentlemen at various times were president of Hanna companies in Cleveland (R. 212).

contract -- recognized that the contract required Hanna to obtain the approval of the United States to expenditures for additional equipment or facilities. This is the very interpretation the district court rejected!

Subsequently, on February 28, 1955, after the contract had been in existence for more than two years, Spang wrote to the Company's General Manager in Oregon as follows (Pl. Exh. 44):

> [W]e should make a report to the Government showing the respects in which the plant, as constructed and equipped for the present operating period, varies from the Contract provision, and request the Government's approval of any such variations. * * * In connection with any items abandoned and any additional items installed, we should point out the necessity for them and also the approximate costs.

In response to Spang's request that he send the necessary information and Spang would "put together a report to the Government and request its approval to any changes, so that we are completely covered as to the facilities constructed and installed" (Pl. Exh. 44), the General Manager on March 8, 1955, sent Spang "a list of the major items" of "constructed and installed facilities not included in the language of Article IV" which totalled almost $2 million (Pl. Exh. 45). The letter pointed out that some of the expenditures listed "included changes, additions or alterations * * *" (ibid.). Thereafter on January 4, 1956, Spang wrote to the General Services Administration as follows (Pl. Exh. 47, p. 1):

> At the time the above Contract was entered into, detailed specifications for the plant had not been completed, and therefore it was necessary to describe the facilities in the Contract in very general terms and as such facilities then were contemplated.

After quoting the description of the Facility in Article IV, Spang's letter to GSA pointed out that "provision was made also for such other equipment and facilities agreed to by the Government as necessary," and that "[f]inal plans and specifications for the plant include some changes in and additions to the facilities as described in the Contract and subsequent operating experience has suggested others" (ibid.). The letter then stated (id., p. 2):

> [B]ecause of the provision quoted above from the contract [Article IV], we believe it would be in our mutual interest for the record to show that the equipment and facilities reflected in the summaries and against which funds have been advanced are agreed to by the Government as necessary for the conversion of ore from the mine into ferronickel. * * *. Accordingly, we request for the record your concurrence in the construction and installation of such equipment and facilities.

On May 14, 1956, GSA replied to Spang that, on the basis of an inspection of the facilities by a GSA engineer and Hanna's "representations," "the additional facilities installed at the time of this inspection are agreed to by the Government as necessary for the conversion of ore from the mine into saleable ferro-nickel" (Pl. Exh. 48).

The record also indicates that in the meanwhile, when $21,079,709 of the then authorized $22 million of capital

advances had been expended, Hanna stated to the Government that an additional estimated minimum of $1,080,000 of capital costs were contemplated (Deft. Exh. 105, p. 2).[44/] At that time, in order to cover those costs and not exceed the $22 million ceiling, Hanna suggested the following amendment to the contract: "That up to $1,500,000 of the presently authorized $2,800,000 of working capital be permitted to be expended for capitalizable expenditures if and when required in our judgment" (id. at attachment p. 2). At a meeting between Hanna Government officials, this proposal was discussed and Hanna was informed that the Government would not permit a transfer from working capital advances to capital advances (Deft. Exh. 105, p. 2). If the district court decision stands, Hanna nevertheless accomplished the very thing to which the Government refused then to give its consent -- it subsequently used working capital advances to add equipment to the plant.

The record further shows that thereafter -- and even while Hanna was developing its practice of charging expenditure for modification and additions to costs of production -- it still capitalized some such expenditures (which obviously, because of the small amounts involved, could not have added "essential value" to the plant). For example, in January 1957 $3,283.54, and in February 1967 $4,569.33, paid to the Bechtel

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44/ The attachment is the draft of a proposed letter given to the Government's negotiators (Deft. Exh. 105, p. 2).

Corp. by Hanna for "design changes in building and facilities" were capitalized (Pl. Exh. 100, p. 15).

This series of communications and other evidence establishes that, during the early years of contractual performance, Hanna Smelting recognized that the contract did not give it the unilateral right to purchase additional equipment for the smelter with public funds. Instead, its conduct indicates it understood the contract required it to obtain the approval of the Government to the additional equipment installed in the smelter, and that expenditures for such additional equipment and for rebuilding or modifications had to be made with capital advances. Among the disputed items in this litigation are hundreds of thousands of dollars of expenditures for additions to the smelting facility as to which Government approval was never sought and numerous expenditures for modifications, all of which were expensed (see Pl. Exh. 90). The district court's conclusion that the Government must nevertheless pay for these expenditures is plainly wrong.

2. The district court upheld Hanna's expensing of $91,873.96, spent primarily to extend slag disposal facilities, under the "receding face theory" because "the new facilities did not increase the capabilities of the plant, but only enabled it to continue operations" (R. 387). It should be recalled that Article IV of the contract required Hanna Smelting to construct, with advances made by the Government, a facility

consisting of specifically enumerated items of equipment and all additional "equipment and facilities agreed to by the Government as necessary for such conversion of ore from the mine." One of the specifically described items of equipment required was "a slag-disposal site and equipment" (Pl. Exh. 1, p. 3). It is undisputed that Hanna Smelting capitalized -- i.e., used capital advances to construct -- the other specifically described equipment. There is no basis for permitting a different treatment of the cost of the "slag-disposal site and equipment" because of the "receding face theory [which] was developed in mining accounting."

Furthermore, Hanna's present position that expenditures related to the slag disposal site should not be capitalized is contrary to Hanna's belief, documented in the record, before the disputed expenditures were made. In 1957 Hanna Smelting had asked GSA to increase the ceiling on capital advances by $875,000 (see p. 71, infra, and R. 219). Hanna's General Manager in Oregon, on June 21, 1957, sent the Company's Secretary in Cleveland a list to support Hanna's request for $875,000 "of additional capital requirements" (Pl. Exh. 52, p. 1). One of the major groups of items in the list was the following (id. at p. 2):

ITEM 05 - SLAG DISPOSAL FACILITIES:

a.	Change No. 16 and No. 17 belts from 18" to 24"		1958	45,000
b.	Extensions to slag conveyor belts 2000' at $50 per foot	$20,000	1957	
		40,000	1958	
		40,000	1959	100,000
c.	Improvements in granulating layout		1958	50,000
	Total			$195,000

Hanna's General Manager further described the capital needs with respect to "slag disposal facilities" as follows (id. at p. 4):

> Under Item 05, Slag Disposal Facilities, item "a" covers the enlarging of the first two slag conveyor belts. We have found that because of the tendency of granulated slag to stick to the belts, the present 18" belts are inadequate, causing premature belt failures. Item "b" covers additional belt to stack slag. Our slag dump is about 200' high and the extensions mentioned will take us to the limit of our slag stacking area; thereafter, they will be fanned around to completely fill the area. Item "c" covers certain improvements to be made in the general slag granulating area. * * * [Emphasis added.]

Hanna Smelting's request that the ceiling on capital advances be increased by $875,000 was granted on November 8, 1957 (R. 206). As shown above, one of the bases for Hanna's request for additional capital advances to be authorized was its belief that it needed additional capital advances for the slag disposal site. And, the evidence further shows, all of that capital advance money was to be spent to improve and extend the already existing facilities -- for example, $100,000 was to be used to extend the slag conveyor belts (the very items which comprise the bulk of the disputed $91,873.96). Despite these facts, Hanna Smelting subsequently treated the money spent to extend the slag disposal facilities as costs of production. The district court's conclusion that this treatment was proper because the receding face theory is applicable is contrary not only to the language and history of

the contract, but also to Hanna's interpretation of the contrac prior to this litigation.

3. Equally strong evidence reflects on Hanna's treatment during contract performance of expenditures for replacements and improvements. For example, the record shows that on February 21, 1957, the General Manager of Hanna Smelting's operations in Oregon wrote to R. C. Fish in Cleveland (who apparently was the Company's president at that time, see R. 212) a detailed letter which began with the sentence: "The last time you were here we discussed the possibility of additional capital money being required to complete or make required additions to the present plant and make such changes as appeared necessary or feasible to promote good operation" (Pl. Exh. 51, p. 1). The letter included "a complete list" of such items estimated as costing a total of $1,021,200. On the list were amounts for "enlarged and improved dutch ovens"[45/] and numerous other items that were preceded by the word "improved," "better," "larger," or "replace" (id. at pp. 1-2). The brief descriptions of the items in that letter indicate that they were of substantially the same kind as the items in dispute here, and that few if any of them were capitalizable under smelting industry accounting since, in the

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45/ As mentioned previously, the dutch ovens were in fact subsequently replaced by Hanna Smelting with new ones (see p. 15 , supra). The more than $97,000 spent for those new ovens was, however, treated as a cost of production.

words of the court below, they would not in and of themselves "materially increase the capabilities or value of the plant considered as a whole" (R. 386).

Thus, Hanna Smelting at the time that letter was written believed (contrary to its current position) that capital advances had to be used for replacements or improvements to the smelting facility. Hanna's recognition of this is underscored by the statement in the letter that "some of the minor shop tools could and probably should be charged to Cost" (Pl. Exh. 51, p. 2). The statement indicates that Hanna's General Manager considered, and rejected, the thought that all of the items listed in his letter, and not merely the expenditures for shop tools, similarly "could and probably should be charged to Cost."

In the meanwhile, GSA's engineer had examined Hanna's Oregon facilities and had recommended that the capital advance ceiling of $22 million authorized be increased by $875,000 (Deft. Exh. 28, Report p. 4; Pl. Exh. 52, p. 1). Accordingly, Hanna's General Manager was requested to modify his previous estimates and show "in detail our request for $875,000 of additional capital requirements" (Pl. Exh. 52, p. 1). By letter of June 21, 1957, to Hanna's Secretary the General Manager forwarded a list of over 25 items estimated as costing a total of $875,000 of "additional capital requirements" (ibid.).

Included in this list were items such as the following (Pl. Exh. 52, pp. 1-2):

Replacement of present flat bed	4,000
Replacement of 1 dump truck	4,000
Replacement of cars (total)	8,500
Replacement of 2 small payloaders	30,000
Replacement of large payloader	15,000
Replacement of small tractor	15,000
Replacement of fork lifts	24,000
Improvement of iron shredding facilities	50,000
Change No. 16 and No. 17 belts from 18" to 24"	45,000

It should be recalled that the district court found that Hanna Smelting had properly expensed, rather than capitalized, the replacements and improvements involved in this litigation because, under the "single capital unit" theory of smelting accounting, "replacements or improvements, even if long-lived, are expensed unless they materially increase the capabilities or value of the plant considered as a whole" (R. 386). Almost all of the items listed in Hanna's letter were the kind of item in dispute here. That is, they were "replacements" and/or "improvements" in the ordinary sense of those words, but which should be capitalized under the "single capital unit" theory. For example, the replacement of "cars" with new "cars," a "dump truck" with a new "dump truck," "payloaders" with new "payloaders," simply would not affect the capacity of the plant as a whole. Nevertheless, in 1957, contrary to smelting accounting practice, Hanna Smelting believed that these numerous items of replacements, improvements, and modifications should

be capitalized -- i.e., acquired with capital advances -- and should not be acquired with working capital advances and then treated as costs of production.

It is especially significant that Hanna proposed to ask for additional capital advances to be authorized to cover "the enlarging of the first two slag conveyor belts" from 18 inch to 24 inch belts (Pl. Exh. 52, p. 2, Item 05(a), and p. 4). One of the disputed expenditures in this litigation (Item 222, Pl. Exh. 82) concerns $25,469.45 spent by Hanna in 1957 to convert a 24-inch conveyor belt system used in moving ore from the stockpile at the mine to the dryers to a 36-inch system. The total cost of the new system (which had a 15-year estimated useful life (see Pl. Exh. 166)) was treated as a cost of production (ibid.). The district court upheld this treatment, also on the theory that under smelting industry accounting practice this type of expenditure is properly expensed, even though the evidence, as summarized above, indicates that Hanna in 1957 proposed capital advance treatment for a virtually identical expenditure.

4. Other indications that Hanna Smelting recognized during contract performance that the parties intended the contract to be interpreted as the Government urges were found in Hanna's files during pre-trail proceedings and were introduced in evidence. For example, on August 8, 1956, when approximately 95 percent of total authorized capital advances had been drawn

by Hanna,[46] Spang drafted a proposed amendment that would have redefined "cost of production" to include capital expenditures (Pl. Exh. 145). The proposed amendment was not adopted. Under this proposal, cost of production was to be redefined as follows (id. at p. 1):

> Cost of production shall be the amount determined by the Contractor from time to time to be reasonably required to cover production costs, necessary capital expenditures not otherwise provided for, and working capital requirements.

Other documents found in Hanna's files demonstrate that even while Hanna Smelting was charging expenditures for replacements and improvements to costs of production, responsible officials of the Company -- ranging from the Secretary of the Company to the Company's accountant in Oregon -- were extremely concerned about the propriety of the practice under the contract. That evidence indicates that those officials believed that the expenditures were not properly costs of production and should have been capitalized. See Pl. Exhs. 163 and 164 (memoranda from the Company's Chief Clerk in Oregon), 49, and 65, pp. 48-50.[47]

46/ By July 1, 1956, one month prior to the date of the proposed language change, Hanna had drawn $20,870,000 of the then authorized total capital advances of $22 million (Pl. Exh. 7). By that time, too, Hanna had already charged a significant number of the disputed expenditures to cost of production (see Pl. Exh. 9).

47/ In attempting to meet the argument made in this section of our brief, appellees will undoubtedly stress that on various occasions Government officials expressed their views that generally accepted accounting principles and practices were to control Hanna's treatment of expenditures under the contract.
[continued]

EVEN UNDER GENERALLY ACCEPTED ACCOUNTING PRINCIPLES AND PRACTICES, 201 OF THE 216 DISPUTED EXPENDITURES SHOULD HAVE BEEN CAPITALIZED.

We have shown above that the contract itself sets the standards the parties intended to determine whether expenditures should have been charged to costs of production or capitalized. We have also demonstrated that the district court improperly read into the contract "accounting practice common to the smelting industry" and other accounting theories as the standard for determining whether expenditures should be capitalized. We now show that even should the Court feel that the contract is not sufficiently explicit in setting out the contract accounting system, and that the parties must have contemplated the application of an external standard in determining whether expenditures should be capitalized or expensed, the standard must be that of "generally accepted accounting

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47/ [continued] For example, the record indicates that on February 6, 1953, the Director of Financial Analysis for the Defense Materials Procurement Agency wrote Hanna stating in part: "In respect to the accounting methods which you will employ in connection with this contract, it is our policy to adhere to sound accounting practices and generally accepted accounting principles to the maximum extent possible" (Pl. Exh. 95, p. 2, emphasis added). This statement is by no means inconsistent with the Government's position in this litigation. As we shall demonstrate in Point II, infra, there is only a minute difference between the accounting system established by the contract and generally accepted accounting principles and practices. Accordingly, had Hanna complied with those principles "to the maximum extent possible" it would have been in substantial compliance with the contract. More significantly, however, this letter -- written within one month after the smelting contract was executed -- contains absolutely no reference to generally accepted accounting practice in the smelting industry, the standard Hanna (and the district court) believed applicable.

practice" the only external standard referred to in the contract The uncontradicted evidence, as we shall also point out, establishes that if generally accepted accounting practice is dispositive, then Hanna Smelting improperly expensed 201 of the 216 disputed expenditures costing a total of $1,372,845.57 (Pl. Exh. 172).

1. The capital advance provision does, of course, contain a reference to "generally accepted accounting practice." Clause (d), paragraph 1, of Article VI provides capital advance coverage "for such other necessary and so agreed upon expenditures which, in accordance with generally accepted accounting practice, are capitalized." Hanna argued in the court below that the phrase "which, in accordance with generally accepted accounting practice, are capitalized" must be read into clauses (b) and (c), so that only those expenditures for additions, modifications, replacements, or improvements which are capitalized under generally accepted accounting practice could not be treated as costs of production. And, it further urged, "in the smelting industry" must be tacked onto the phrase "generally accepted accounting practice" when reading the phrase into clauses (b) and (c). The absence of support for this contention and its incompatability with the rest of the contract has previously been shown; there is simply no evidence to indicate that the parties even thought "accounting practice in the smelting industry" the relevant standard when they entered into the contract (see pp. 54-60 , supra). We believe the contract

itself shows the accounting system intended by the parties to be applicable and that reference to generally accepted accounting practice should be unnecessary. However, should the Court be of the view that an external standard is necessary, the standard should be that of "generally accepted accounting practice" and not accounting practice peculiar to the smelting industry.

2. The various accounting experts presented by the parties testified as to the meaning of the term "generally accepted accounting practice." The Government's witness, Dr. Wright, testified that "generally accepted accounting practices are the mechanisms by which a particular company achieves the objectives of generally accepted accounting principles" (Jul. Tr. 78). And, Dr. Wright pointed out, generally accepted accounting principles are "a series of standards, a body of concepts"; they "represent the body of doctrine which provides the standards for measurement principally for the independent certified public accountant in forming an opinion with respect to the reliability of his client's financial statements" (Jul. Tr. 82, 78).

Hanna's experts were in substantial agreement with Dr. Wright. Richard Baker of Ernst & Ernst, for example, testified that generally accepted accounting principles "are the rules which have developed in order that proper financial information, proper financial statements, would prevail" (Jul. Tr. 158-159). A generally accepted accounting practice "is the application of these broad general concepts to a given situation" (Jul. Tr. 159). Bruce Smith of Price, Waterhouse &

Company testified for Hanna on this point as follows (Jul Tr. 212):

> The phrase, "generally accepted practice" goes back to the early 1930's, and so far as we have been able to find out, was first used in correspondence between the New York Stock Exchange and what we know today as the American Institute of Certified Public Accountants. It was then the American Institute of Accounting. They not only, so far as we can find out, used the phrase first at that time, but they did the same thing we are doing today. They used the term "generally accepted accounting principles" and "generally accepted accounting practices" interchangeably. [Emphasis added.]

The Government introduced evidence on its alternative position that, if generally accepted accounting practice were applicable, then 201 of the 216 disputed expenditures were improperly expensed and not capitalized. Plaintiff's Exhibit 172 contains a reclassification by Dr. Wright of items in three of the categories in Plaintiff's Exhibit 90 "to bring them into accord with generally accepted accounting practices." This uncontroverted exhibit establishes that if generally accepted accounting practices are applicable, then 15 of the 216 disputed items costing a total of $19,530.98 were properly expensed, and 201 items costing a total of $1,372,845.57 were improperly treated by Hanna as costs of production.

Hanna introduced no evidence to controvert this exhibit or Dr. Wright's testimony in this regard, adhering instead to its position that accounting practice peculiar to the smelting industry is applicable. Indeed, one of Hanna's accounting

witnesses, Bruce Smith, recognized that if generally accepted accounting practice and not practice in the smelting industry were applicable, Hanna could not prevail.[48] Accordingly, if the Court is of the view that generally accepted accounting practice is applicable, then the Government's recovery in the court below should be increased by $1,141,340 because of the improper expensing of capital items, and by $3,901 on the reformation point for items improperly expensed in 1959 and 1960.[49]

III

TREATMENT OF THE $114,234.82 SPENT FOR NEW DUST COLLECTION EQUIPMENT AS AN EXPENSE CANNOT STAND EVEN UNDER THE DISTRICT COURT'S INTERPRETATION OF THE CONTRACT.

The district court's conclusion that Hanna Smelting properly expensed disputed Item 49 (the sum of $198,746.62 expended for dust collection equipment) is deserving of special mention. For even if the Court were to reject the arguments previously advanced in this brief, and accepted the district court's interpretation of the contract, the Government would be entitled to recover $114,234 on the item.

48/ Smith testified as follows (Jul. Tr. 204):

> If we thought of the furnace in the same sense that we think of the cutting machine in the manufacturing operation, we would then have to say that when we replace that with a new one, we would be forced to capitalize it, but that is not the generally accepted accounting practice of the smelting industry.

49/ Under generally accepted accounting practice, the total recovery would amount to $1,372,846 for 201 disputed expenditures and $245,699 on reformation.

The original agreed description of this item in Plaintiff's Exhibit 82 may be summarized as follows: Among the equipment originally installed in the smelter were "cyclone type dust collectors in four areas of the plant. After operations began, Hanna Smelting determined that the problem of nickel dust escaping and poluting the atmosphere was considerably more acute than originally estimated. To rectify the situation, Hanna Smelting began "a progressive program of installing more efficient dust collecting equipment." At the four sites at which dust was produced, "bag-house type collection equipment" was installed. The equipment could not, however, be installed in the same location as the old equipment; additionally, the old duct work could not be connected to the new equipment and much of it was no longer usable because of deterioration. The entire work related to the new equipment was performed for Hanna by a subcontractor from March through December 1957 at a total cost of $893,364. Of this amount, $694,618 "were charged to a capital account." The remainder of $198,746.62, the agreed description continued, "represents expenditures for removing old collectors and removing and replacing the auxiliary duct work and was charged to cost of production during March to December 1957" (emphasis added).

At the trial before the district judge, Hanna's accounting experts testified that the company properly expensed the $198,746.62. Richard Baker of Ernst & Ernst testified that this

amount was properly expensed because it "represents the cost of taking out the old duct work which was worn out and wasn't working effectively, and certain amounts were [spent] in replacing the old one" (Jul. Tr. 182). On cross-examination, Baker was shown Plaintiff's Exhibit 89 -- a schedule indicating that a substantial portion of the $198,746.62 was actually spent not to remove the old equipment as Plaintiff's Exhibit 82 had indicated, but, instead, to fabricate, erect, and install the new equipment -- and asked how these expenditures in fact differed from the $694,618 that had been capitalized. Baker's response was: "I think that the large amount of these charges cover the putting in and actually replacing duct work that was already there, that was worn out and under any condition would have been necessary to replace" (Jul. Tr. 257).

On November 23, 1965, some four months after the trial before Judge Solomon, the parties entered into the following stipulation concerning the previously agreed description of item 49 and Plaintiff's Exhibit 89 (R. 336-337):

> With respect to Item 49 in plaintiff's Exhibit 82, the parties agreed that the disputed $198,747.62 represents "expenditures for removing old (dust) collectors and removing and replacing the auxiliary duct work." Plaintiff's Exhibit 89 states that, based on plaintiff's analysis of 20 of Hanna's purchase orders representing $162,168.65 of the disputed $198,747.62, the sum of $159,667.25 was expended for fabrication, equipment, erection and installation of new dust collection equipment and the sum of $2,501.40 was expended for modification, reworking and removal of old dust collection equipment. Plaintiff's Exhibit 89 was admitted in evidence provisionally and subject to defendants' objections of relevancy, materiality, correctness and veracity.

> Plaintiff and defendants agree that, because of the time and expense involved, full and complete verification of plaintiff's Exhibit 89 is not now practicable; the parties further agree that, of the total of $162,168.65, shown on plaintiff's Exhibit 89, (1) the sum of $114,234.82 was expended for fabrication, equipment, erection and installation of new dust collection equipment, and (2) based in part on Hanna's 20 purchase orders, but primarily on the estimate of the President of Medford Steel Company (which installed the dust collection equipment) contained in Medford's $76,440 contract bid to Hanna, that 43.2% of the subsequently executed $76,440 contract price was for removal of old duct work, stacks and multiclones of the old dust collection system, defendants do not agree that more than $114,234.82 represents expenditures for new dust collection equipment and contend that the sum of $47,933.83 of such $162,168.65 represents expenditures for removing old dust collection equipment.
>
> Except as qualified herein, defendants waive all objections of correctness and veracity to plaintiff's Exhibit 89; defendants continue to reserve objections of relevancy and materiality to plaintiff's Exhibit 89. [Emphasis added.]

This stipulation conclusively establishes that not less than $114,234.82 of Item 49 was spent not for removal of the old equipment and ducts but for "new dust collection equipment." Hanna's sole contention during the trial was that the entire amount of Item 49, $198,746.62, should be expensed because it was spent solely to remove the old equipment. It follows from the stipulation that "$114,234.82 was expended for fabrication, equipment, erection and installation of new dust collection equipment" (R. 337) and that the purpose of the expenditure was identical to the "expenditures totalling $694,618.00 which pertained to the new equipment, [which] were charged to a

capital account" (Pl. Exh. 82, Item 49). It equally follows that, at the very least, $114,234.82 should have been capitalized and not treated as a cost of production.[50/]

The district court's opinion indicates that it gave absolutely no consideration to the parties' stipulation. For the court described this disputed expenditure as follows (R. 381):

> In 1957, the Company installed a new dust collection system at a cost of $893,364. It capitalized $694,917.38 spent for new equipment, but expensed $198,746.62, the amount spent to remove and replace the original, inadequate equipment.

Contrary to the court's opinion, however, the stipulated fact, as we have shown, is that no more than $84,511.80 was spent "to remove and replace the original, inadequate equipment" and $114,234.82 was spent "for new equipment." Accordingly, even under the district court's interpretation of the contract (which we have shown is erroneous) Hanna Smelting was not entitled to treat the $114,234.82 as a cost of production and, therefore, was overpaid by that amount.

50/ Of course, should the Government prevail either on its main or alternative interpretations of the contract, the full amount of $198,746 spent for the dust collection equipment would be recoverable.

IV

THE DISTRICT COURT'S ALTERNATIVE HOLDING THAT THE GOVERNMENT "IS ESTOPPED BY ACQUIESCENCE" FROM COMPLAINING ABOUT MOST OF THE EXPENDITURES MADE AFTER 1957 IS ERRONEOUS.

As "an alternative ground of decision," the district court held "that, with two exceptions, the Government is estopped by acquiescence from asserting any claim for expenditures made after January 1, 1958" (R. 390). The "two exceptions" were Hanna's expenditures for six major items costing $215,110 which the court found were improperly expensed "solely to obtain reimbursement" and for the thirty-two items each costing under $1,000 which were expensed solely because they cost less than $1,000 (ibid). Estoppel was not applicable to the six items, the court found, because "the Government could not have anticipated the Company's use of this accounting method"; and the doctrine had no application to the thirty-two items, the court further found, because the practice of expensing items costing under $1,000 "was not consistently followed by the Company" (R. 390).

In its opinion, the court set out the factual basis for holding the Government estopped as follows: D.A.N. Pattarson, an employee of G.S.A. "now deceased", had audited Hanna's books on behalf of that agency (R. 392). The first audit was made during 1957 in Cleveland, and Pattarson had relied primarily on Ernst & Ernst's working papers (ibid.). "These working papers," the court found, "revealed the disputed expenditures and even contained memoranda on whether to expense or capitalize some of

the disputed items" (R. 392). In September and November 1958, a three-man team from the General Accounting office audited Hanna's books in Oregon (R. 393). Based on these facts the court found "there can be no doubt that Pattarson and the G.A.O. accounting team were charged with the duty of auditing the Company's accounting methods and that they knew or should have known of the practices in dispute." (R. 394) The court deemed it irrelevant "whether these accountants had authority to speak" for the Government, holding that they had "a duty to report the Company's practices to their superiors," and, therefore, the knowledge they had or should have had "must be imputed to their superiors" (R. 394).

Because the evidence on the point is conflicting, we do not challenge as "clearly erroneous" the district court's finding that Pattarson and the GAO accounting team "knew or should have known of the practices in dispute" from their audits. We strongly challenge, however, the conclusion that the United States is "estopped" because of the knowledge those auditors had or should have had from challenging Hanna's expensing of capital items costing $319,466.93 during the years 1958 through 1961.[51/] In the first place, the law is established that mere

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51/ As indicated in the court's opinion, disputed items costing a total of $550,972.93 were expensed from 1958 through 1961 (R. 392). Deducting from that amount the sum of $231,506.00, as to which the court held estoppel inapplicable, indicates that the court's estoppel holding, if affirmed, would bar the United States from recovering $319,466.93 of the disputed expenditures.

silence in the absence of an intent to deceive (undeniably the situation here) is at most an implied acquiescence and constitutes laches, not estoppel; it is similarly established that the Government is not precluded by the silence of its agents from asserting public rights. Moreover, equitable estoppel is in any event not applicable (even if it ever applied to the Government) because many of the essential elements of that defense are lacking.

A. At Most, the Government Was Guilty of Laches in Failing To Object Sooner About Hanna's Practices; Laches Is, However, Unavailable as a Defense Against the United States.

The doctrine of equitable estoppel is wholly inapplicable in the circumstances of this case. The undeniable fact is that the Government never made any misrepresentation, or indeed any representation at all. At worst, the Government's auditors were guilty solely of neglect of duty or lack of diligence in failing to discover sooner that Hanna was employing improper practices (or, if they actually had discovered the practices, in failing to make them known to their superiors); their lack of diligence resulted in silence, which at most constituted an "implied acquiescence" in Hanna's practices. But "implied acquiescence" is simply laches, and is not available as a defense against the United States. Utah Power & Light Co. v. United States, 243 U.S. 389, 403.

In Utah Power & Light, the Government sought to enjoin the continued occupancy without its permission of federal lands on

which the respondents, over a period in excess of twenty years, had constructed dams, reservoirs, buildings, and other improvements. In holding the grant of the injunction by the lower court proper, the Supreme Court held (id. at 409):

> As presenting another ground of estoppel it is said that the agents in the forestry service and other officers and employees of the Government, with knowledge of what the defendants were doing, not only did not object thereto but impliedly acquiesced therein until after the works were completed and put in operation. This ground also must fail. As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest. United States v. Kirkpatrick, 9 Wheat. 720, 735; Steele v. United States, 113 U.S. 128, 134; United States v. Beebe, 127 U.S. 338, 344; United States v. Insley, 130 U.S. 263-265-266; United States v. Dalles Military Road Co., 140 U.S. 599, 632; United States v. Michigan, 190 U.S. 379, 405; State ex rel. Lott v. Brewer, 64 Alabama, 287, 298; State v. Brown, 67 Illinois, 435, 438; Den v. Lunsford, 20 N. Car. 407; Humphrey v. Queen, 2 Can. Exch. 386, 390 Queen v. Black, 6 Can. Exch. 236, 253.

Thus "implied acquiescence" may be a basis for the equitable defense of laches,[52/] but it provides no defense to a suit by the Government to enforce a public right.

It is, of course, firmly established that the Government is not precluded by the silence of its agents -- laches -- from asserting public rights. Utah Power & Light Co. v.

52/ As the Supreme Court noted in Southern Pacific Co. v. Bogert, 250 U.S. 483, 488, "[T]he essence of laches is not merely lapse of time. It is essential that there be also acquiescence in the alleged wrong * * *." More recently, in Costello v. United States, 365 U.S. 265, 282, the Court defined laches as "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense."

United States, supra, 243 U.S. at 403, 409; Costello v. United States, 365 U.S. 265, 281-282. In the Costello case, the Supreme Court stated the reason for the "principle that laches is not a defense against the sovereign" as follows (365 U.S. at 281):

> The reason underlying the principle, said Mr. Justice Story, is "to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers." United States v. Hoar, 26 Fed. Cas. 329, 330 (No. 15,373). This Court has consistently adhered to this principle. See, for example, United States v. Kirkpatrick, 9 Wheat. 720, 735-737; United States v. Knight, 14 Pet. 301, 315; see also United States v. Summerlin, 310 U.S. 414, 416; Board of County Commissioners v. United States, 308 U.S. 343, 351; United States v. Thompson, 98 U.S. 486, 489.

In sum, therefore, even assuming that Government officials lulled Hanna into a sense of security by failing to object sooner to Hanna's erroneous accounting practices, because of "the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers" (Costello v. United States, supra), their neglect does not preclude the Government from recovering over $319,000 of public funds to which it is (as we have shown) otherwise entitled.

B. In Any Event, the Doctrine of Estoppel Is Inapplicable Because Many of Its Essential Elements Are Lacking Here.

In one of the leading treatises on equitable remedies (the treatise relied on by the court below, see R. 390) the doctrine of equitable estoppel is defined as follows (3 Pomeroy, Equity Jurisprudence (5th ed.) 189):

> Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy.

The "essential elements which must enter into and form a part of an equitable estoppel" are more specifically stated by Pomeroy as follows (id. at pp. 191-192):

> 1. There must be conduct--acts, language or silence--amounting to a representation or a concealment of material facts. 2. These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. 3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, and at the time when it was acted upon by him. 4. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by other party, or under such circumstances that it is both natural and probable that it will be so acted upon. There are several familiar species in which it is simply impossible to ascribe any intention or even expectation to the party estopped that his conduct will be acted upon by the one who afterwards claims the benefit of the estoppel. 5. The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. 6. He must in fact act upon it in such a manner as to change his position for the worse; in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it. [Emphasis in original.]

This Court has adopted Pomeroy's criteria.[53/]

Even if the United States could ever be estopped because of the acts or omissions of its field agents (compare FCIC v. Merrill, 332 U.S. 380) the elements of estoppel are plainly lacking here. For example, there was no misrepresentation or concealment of material facts here (element 1); there was at worst a failure to assert the public rights of the Government earlier. Similarly, there was no evidence of any intent or expectation on the part of any Government official that Hanna would act upon its silence (element 4). Indeed, as we have noted above (supra, p.87), there was no evidence that any responsible Government official had any actual knowledge of the facts of Hanna's practices (element 2). Lastly, it is clear (and the district court recognized) that Hanna did not change its position as a result of the Government's conduct (element 6). On the contrary, Hanna had started its practice of expensing additions, modifications, replacements or improvements, rather than capitalizing them,

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53/ This Court has stated the "elements [which] must be present to establish the defense of estoppel" as follows:

> (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Hampton v. Paramount Pictures Corp., 279 F. 2d 100, 104 (C.A. 9, 1960). See also California State Board of Equalization v. Coast Radion Products, 228 F. 2d 520, 525 (C.A. 9, 1955). This statement and Pomeroy's are virtually identical, except that element (2) above combines Pomeroy's elements 1 and 4, and element (4) combines Pomeroy's elements (5) and (6).

long before the Government's silence became relevant. In short, it is clear that necessary elements of estoppel are lacking here, even if estoppel could run against the Government. As we have shown, the Government's inaction here constituted no more than laches, which cannot be asserted as a defense against the sovereign.

CONCLUSION

For the foregoing reasons, (1) to the extent the judgment of the district court denies the United States the relief sought, it should be reversed and the case remanded to the district court for the entry of an additional judgment against the appellees in the amount of $1,168,671 (or, if the Court adopts the Government's alternative position, in the amount of $ 1,145,241) together with interest at 6 percent per annum from the dates of the overpayments until the judgment is paid;[55] (2) to the extent the judgment of

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54/ The district court's reliance on Mahoning Investment Co. v. United States, 3 F. Supp. 622 (Ct. Cl. 1933), certiorari denied, 291 U.S. 675, for the proposition that a change in position is unnecessary where acquiescence is the basis for estoppel, is misplaced. The acquiescence relied on by the Court of Claims there was not mere silence as in the present case, but rather affirmative representations establishing that the taxpayer acquiesced in the Government's conduct.

55/ Prejudgment interest was not requested, and should not be awarded, on the portion of the judgment increasing the recovery under the 1964 termination agreement; that agreement contemplated an award without prejudgment interest in this litigation (see Pl. Exh. 3).

the district court awards the United States the relief sought, it should be affirmed and judgment entered in this Court, pursuant to Rule 24(1) of the Court's rules, for interest on the judgment below from April 27, 1966 (the date of entry of the judgment), until it is paid.[56/]

Respectfully submitted,

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May 1967

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ATTORNEY

56/ It is undisputed that the Hanna Mining Company "guaranteed the reimbursement" to the United States of any funds advanced to Hanna Smelting "which had been expended by Hanna in violation of the provisions of Contract DMP-50" (Agreed Facts, ¶ V, R. 299). The district court, apparently through oversight, neglected to enter judgment against The Hanna Mining Company on its guarantee of reimbursement for amounts found due on reformation. Accordingly the judgment to be entered by the district court against The Hanna Mining Company should be for the entire amount due from Hanna Smelting to the United States.

APPENDIX PURSUANT TO RULE 18(f) OF THE COURT'S RULES

Pursuant to Rule 18(f) of the Court's Rules, following is a table of page references to the record where the various exhibits were identified, offered, and received in evidence:

EXHIBIT	IDENTIFIED	OFFERED AND RECEIVED
Plaintiff's Exhibits:		
1 through 80	R. 246-249	Oct. Tr. 3-4
82 through 179	R. 315-318	Jul. Tr. 2
Defendants' Exhibits:		
1 through 110C	R. 241-245	Oct. Tr. 3
113 through 130	R. 324	Jul. Tr. 2

No. 21,23[illegible]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NITED STATES OF AMERICA,
Appellant,

vs.

ANNA NICKEL SMELTING COMPANY, corporation, and THE HANNA INING COMPANY, a corporation,
Appellees.

FILED
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ANNA NICKEL SMELTING COMPANY, corporation, and THE HANNA INING COMPANY, a corporation,
Cross-Appellants,

vs

NITED STATES OF AMERICA,
Cross-Appellee.

On Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

REPLY BRIEF OF CROSS-APPELLANTS

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 21,232

HANNA NICKEL SMELTING COMPANY,
a corporation, and THE HANNA
MINING COMPANY, a corporation,

Cross-Appellants,

vs.

UNITED STATES OF AMERICA,

Cross-Appellee.

On Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

REPLY BRIEF OF CROSS-APPELLANTS

1. The District Court erred in reforming the agreed ceiling price under the 1961 agreement ("Amendment 5").

The contract which the District Court reformed provided that the ceiling price on the last 19,500,000 pounds of nickel would be $.5877 per pound.

The briefs and the authorities agree that, to support

a decree of reformation, there must be (i) clear and convincing evidence of (ii) a meeting of the minds of the parties on an agreement which (iii) by mutual mistake differs from (iv) the agreement actually recorded in writing.

The District Court found, by implication if not quite explicitly, that by mutual mistake the agreement stated a ceiling price of $.5877, whereas the parties had actually agreed upon a formula for fixing a ceiling price. What was that formula?

From the dollar amounts in the District Court's decree, it follows that the alleged formula was either (a) Hanna's 1960 production costs (after adjustment for nonrecurring costs and after audit), plus or minus the difference between its 1960 costs as adjusted and audited and its previously audited 1959 costs, as adjusted; or (b) Hanna's 1960 production costs, after adjustment and audit, minus the excess, if any, of its previously audited 1959 costs, as adjusted, over its 1960 costs, as adjusted and audited.

Where is the necessary "full, clear, cogent, and decisive"[1] evidence that the parties agreed on any such thing in lieu of what appears in the contract? The negotiation was by an exchange of letters which are in the record (O'Dwyer's testimony relates only to the thought processes which lay behind the Government's letters, not to any communication with Hanna); and in these letters there is no scintilla of evidence that the

---

1. Lundgren v. Freeman, (CA 9 1962) 307 F2d 104 at 113.

rties agreed, or would have agreed, to any such formula.

These letters make it clear that the Government wanted e benefit of any continued decline of Hanna's future actual oduction costs; that, in view of the stretch-out of deliveries, wanted protection against higher production costs in periods low production and therefore wanted a definite, fixed ceiling ice per pound; that it wanted this ceiling price to be lower an the lowest production cost attained by Hanna to that date; at it realized that in negotiating the ceiling price it was aling -- and it intended to deal -- not with audited production sts, but, as the letters stated, with "projections" and "esti-tes" based on 1960 costs known to be unaudited.[2] The Govern-nt's proposal to Hanna was a ceiling price of $.5877. The vious and sole reason for including the mathematical analysis ong with the Government's proposal was to persuade Hanna that e $.5877 proposal was not unreasonable and should be accepted. ere is no evidence in the exchange of correspondence (the only idence relating to the agreement between the parties) of an reement on a formula which was mistranslated into a definite ice in the written contract.

In light of the foregoing, it is not surprising that e District Court's findings are technically insufficient to

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Amendment 5 was signed April 20, 1961, effective from April 1, 1961. The letters leading up to it were written in March, 1961; the Government's proposal and the mathematics on which it now relies were contained in its letter of March 9, 1961. The Government's regular audit of Hanna's 1960 costs began in February, 1961 and continued into June, 1961. See 253 F Supp at 794.

support a decree of reformation. The only finding on this subject is that the price "was computed by an agreed formula which was based upon the difference between the Company's costs of production in 1959 and 1960." There is no finding as to precisely what this agreed formula was, and no finding that the parties mistakenly failed to translate it into words in the contract in lieu of using the figure of $.5877. Under the cases defining the requirements of reformation, therefore, the findings are insufficient to support a decree of reformation. For the reasons stated above, the necessary findings could not have been made upon this record.

It was "clearly erroneous" for the District Court to view the evidence as "full, clear, cogent, and decisive" in support of the Government's allegation of mutual mistake. The decree of reformation must, therefore, be reversed.

2. The District Court abused its discretion and erred in awarding prejudgment interest.

The Government defends the District Court's award of prejudgment interest only on the ground that it was a discretionary ruling (Gov Reply Br 32). The question, however, is whether under the circumstances of this case the Court's ruling was consistent with established principles which govern its discretion to make such an award: That prejudgment interest is generally disallowed where, as here, the claim is unliquidated (Miller v. Robertson, (1924) 266 US 243 at 258); and that its allowance

ıst be necessary to arrive at fair compensation (Concordia
ıs. Co. v. School Dist., (1931) 282 US 545 at 554) and must not
inequitable (Jackson County v. United States, (1939) 308 US
3 at 352).

The Government simply ignores the cases which establish
ıat this was an unliquidated claim (Hanna Br 82-84) and cites
ne suggesting that it was not. It even cites a Fourth Circuit
se[3] which, while allowing prejudgment interest under the circum-
ances, expressly holds that such claims are unliquidated (Gov
ply Br 36). In light of the record and the authorities, the
ggestion (Gov Reply Br 34) that this case resembles in any way
ıatever an action on two $1,000 promissory notes is incredible.

The award of prejudgment interest in this case was an
ouse of the District Court's discretion. The Government sought
recover allegedly erroneous payments for capital items of
ıich it had the substantial use and benefit. Hanna was not
oligated to spend its own money for the Government, and the
overnment does not deny that it benefited from the purchase and
se of the reclassified items (Hanna Br 85). Nor does it deny
ıat sufficient unused capital funds were available to purchase
ıem until total deliveries reached 95 million pounds in September,
960. The benefit accruing to the Government from these pur-
ıases -- which were all charged back to Hanna by the District

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3 E. I. DuPont de Nemours & Co. v. Lyles & Lang Const. Co., (CA 4 1955) 219 F2d 328 at 341.

Court -- makes an award of interest unnecessary to make the Government whole and grossly inequitable (see cases cited in Hanna's brief at page 85).

3. The District Court erred in allowing interest for a period prior to the Government's demands for reimbursement.

The Government does not refer at all to Hanna's claim that if prejudgment interest could be allowed at all (which Hanna denies), interest on each item of the award commenced only when repayment was demanded by the Government, not from the respective dates of overpayment (Hanna Br 86-90). In the absence of any response, we assume that the Government concedes the correctness of Hanna's contention that the award of prejudgment interest, if proper at all, was excessive by $26,840.34.

CONCLUSION

The District Court erred in reforming the agreed ceiling price in Amendment 5 and awarding prejudgment interest from the dates of overpayment on the relatively small amount of the Government's claim which it allowed. The judgment in favor of the Government should be reduced to $231,506.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of he foregoing brief, I have examined Rules 18 and 19 of the nited States Court of Appeals for the Ninth Circuit, and that, n my opinion, the foregoing brief is in full compliance with hose rules.

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No. 21,232

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant and Cross-Appellee,

v.

HANNA NICKEL SMELTING COMPANY, a corporation,
and THE HANNA MINING COMPANY, a corporation,

Appellees and Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

REPLY BRIEF FOR THE UNITED STATES AS APPELLANT

and

ANSWERING BRIEF AS CROSS-APPELLEE

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IN THE UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

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v.

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Appellees and Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

REPLY BRIEF FOR THE UNITED STATES AS APPELLANT

and

ANSWERING BRIEF AS CROSS-APPELLEE

I. REPLY BRIEF

1. Introduction.

As we developed in our opening brief, this case arises from Hanna's contract to construct a new type of nickel smelting plant for the United States with capital funds furnished by the government, operate that plant, and sell the refined nickel to the government at its "cost of production." Hanna also got the right to buy the plant from the United States for a price equal to 7 and 1/2 percent of the capital

expended in its construction, an option which it exercised.

In this suit the government contends that Hanna overcharged the United States for refined nickel by including in its "cost of production" some $1,400,000 in unauthorized expenditures for capital equipment it acquired for the plant, and seeks recovery of that sum. In substance, we assert (1) that Hanna's acquisition of the smelter equipment in suit was not part of "costs of production" but rather was required by the contract to be purchased out of the capital funds advanced by the United States; (2) that Hanna's expenditures of capital funds for such equipment was permissible under the contract only if the government agreed that the equipment was "necessary or advisable," and (3) that government funds could not be used to purchase capital equipment beyond the dollar limit specified in the contract.

Thus, as our opening brief demonstrated, by charging capital expenditures to "production costs" Hanna breached its contract with the United States in several respects: First, it expended $1,400,000 in public funds for capital items of smelter equipment in disregard of the government's contract right to pass on whether such equipment

---

1/ Hanna's profit under this contract (some $10,000,000 in addition to its option to purchase the smelter at a very favorable price) came on the nickel ore which it sold to the government for use in the new smelter. In addition, Hanna received a management fee of $100,000 per year for operating the smelter for the government. See our opening brief, pp. 2-11.

was actually necessary. Second, it expended public funds for capital items beyond the express $22,875,000 limit which the government contracted to make available for such expenditures. And, third, because the option price for the smelter was set by the contract at a fixed percentage of the government capital expended upon it, by charging the disputed items to "production costs" rather than to capital expenditures, Hanna enabled itself to obtain the disputed $1,400,000 in capital equipment absolutely free upon exercising its option to purchase the plant. On this basis we sought recovery of Hanna's unauthorized expenditure of $1,400,000 for smelter equipment which it passed along to the United States in the guise of "production costs".

The court below ruled that Hanna could not justify charging 38 of the items in suit (acquired for $231,605) to "cost of production" and awarded judgment to the government accordingly, a finding which Hanna does not challenge in this appeal (See Hanna brief, p. 56). The lower court upheld, however, Hanna's treatment of the 178 [2/] remaining

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2/ The reference to 216 disputed items in our opening brief (See, e.g., p. 11) includes both the 178 items with which this appeal is concerned and the 38 items which the court found Hanna improperly charged to the government and Hanna does not challenge here.

items (costing approximately $1,160,000) as production costs chargeable to the United States under "accounting practices in the smelting industry." For the reasons developed at length in our opening brief (pp. 37-85), we submit that the holding adverse to the government is plainly incorrect and contrary both to the terms of the contract and the evidence in the record. Far from rebutting our contentions in this regard, we think the answering brief of appellees underscores the correctness of our position.

2. Hanna's construction of the contract leaves key provisions without meaning.

The principal ground upon which the court below rests its decision was that, though the contract between them did not say so expressly, "the parties intended to apply accounting practices common to the smelting industry". (253 F. Supp. 791). The distinguishing feature of smelting accounting is that "replacements or improvements, even if long lived, are expensed unless they materially increase the capabilities or value of the plant considered as a whole" (ibid.). Thus, in awarding judgment to Hanna with regard to the 178 disputed items of equipment, the district court found that these items -- though purchased for more than $1,160,000 -- increased neither the value nor the capability of the smelter and were therefore properly "expensed" (i.e., charged to "cost of production" borne entirely by the United States) not withstanding the fact that this equipment

concededly has a long useful life and is commercially valuable. We pointed out in our opening brief (pp. 47-53, 61-63) that the lower court's (and Hanna's) interpretation renders meaningless the express contract provision that "capital advances" were to be used "for such replacements or improvements of the Facility which are agreed by the Contractor and the Government to be necessary or advisable during the period of this contract." (Art. IV, par. 1, emphasis supplied). As we there noted, under the court's theory no "replacement" would ever be capitalized. Indeed, this case graphically illustrates that point. Here, more than a million dollars worth of "improvements" and "replacements" in the smelter were effected by Hanna without increasing the plant's capabilities "considered as a whole".

In its answering brief (pp. 35-37), Hanna does not controvert our position regarding the effect of the court's reading of the contract. Nor does it suggest any significant purpose for the contract language requiring replacements and improvements to be acquired out of government capital funds, and only if the government agreed. Rather, it merely says in substance that the court's result is precisely what the parties intended. (Hanna br. pp. 35-37). That contention makes a mockery of the contract. It means that Hanna could (and did) unilaterally replace items of equipment costing hundreds of thousands of dollars as it saw fit while shifting the full cost of these new

acquisitions entirely on the back of the United States. Moreover, Hanna could (and did) then obtain these items for its own commercial use absolutely free by exercising its option to acquire the plant. (The option price was fixed at 7 1/2 percent of the government capital advanced -- but Hanna charged all the replacement machinery to "cost of production" thus not increasing its option price). In short, to read the contract as Hanna would have it would be like giving it a key to the Treasury. It makes virtually meaningless the contract's express dollar limitation on government capital advances contained in the contract as well as eliminates the government's right to insure that, as the contract period neared a close, Hanna could not expend government funds to replace expensive equipment for its own rather than the government's benefit.

On the other hand, our reading of the contract gives meaningful effect to the contract terms dealing with expenditures for "replacements" and "improvements" without being either harsh or unfair to Hanna's interests. It is to be borne in mind that Hanna's profit (ultimately in excess of $10,000,000) was to come from selling the nickel ore to the government, not from the operation of the nickel smelter. The latter was to be carried out at "cost" plus an agreed management fee (See our opening brief, pp. 2-4). In addition, Hanna had the right to acquire the smelter for 7 and 1/2 percent of the capital advances expended in its

construction, subject to the $22,875,000 limit on capital advances specified in the contract. Reading the contract as we urge -- and as we think it plainly should be read -- means only that Hanna had to obtain the government's consent before making major expenditures for replacements and improvements to equipment and, in the event Hanna opted to buy the smelter, that Hanna pay 7 and 1/2 percent of the cost of such replacements and improvements which Hanna itself deemed "necessary or advisable". There is nothing unfair or overreaching about this requirement. We submit that the court below erred in rejecting the government's interpretation of the contract which, unlike Hanna's construction, gives reasonable effect to all the terms in the agreement. As this Court has noted, a meaningful construction of a contract is always preferable. Gray v. Travelers Indemnity Co., 28 F. 2d 549 (C.A. 9); United Artists Corp. v. Strand Productions, 216 F. 2d 305 (C.A. 9), see also, Restatement of the Law, Contracts, § 236(a). In the language of Judge Browning, speaking for a unanimious court in Osborn v. Boeing Airplane Company, 309 F. 2d 99, 103, n. 8:

> "Where the choice is open, language relating to the terms of a contract will be so interpreted that the contract will be fair and reasonable rather than unfair and unreasonable."

In the case at bar, it is the government's interpretation which is "fair and reasonable". The district court was plainly mistaken in rejecting it.

3. The evidence shows that neither party contemplated the use of "smelting accounting" under this risk-free government contract.

It is not disputed that it is only if the parties intended to apply the unique accounting practices of the smelting industry that the 178 disputed items of equipment could be fully charged to the United States as "costs of production". We demonstrated in our opening brief that specific provisions of the contract itself (which of course control where applicable) required replacements and improvements to the smelter be paid for out of capital advances. We also showed (and Hanna's brief does not deny) that capital treatment of such acquisitions would be required under generally accepted accounting practices in industry at large (See our opening brief, pp. 77-91). We do not believe anything in Hanna's brief demonstrates that the parties intended to use "smelting accounting" under the contract in suit. On the contrary, we think a conspicious omission from Hanna's argument makes plain the correctness of our position.

It is of course patent that the use of "smelting accounting" was extremely advantageous to Hanna under this contract. For under this system, Hanna would be able to (and did) make expensive improvements to and even replace a million dollars of high priced equipment in the smelter

as it saw fit, while at the same time placing itself in a position to acquire that equipment for itself entirely at government expense. Yet the contract nowhere provides that it is to be understood in the light of the singular practices inherent in "smelting accounting". And though Hanna's brief purports to trace the history of the negotiations leading up to the contract in suit (See pp. 27-30), nowhere in that history does Hanna point to a single reference to the unique accounting procedures in the smelting industry which it now insists both parties intended to apply all along. We think it incredible that if Hanna--much less the government--intended "smelting accounting" to govern, it would not even so much as make one mention of that fact during the entire course of contract negotiations. (We note that Hanna did not put its own contract negotiators on the stand.) It was Hanna -- not the United States -- which was in a unique position to be aware of the accounting practices peculiar to the smelting industry. It was Hanna -- not the United States -- which stood to gain considerably if smelting accounting applied. Hanna's negotiators skillfully and diligently drove a hard bargain in that company's interest. It is inconceivable that they would have left the company's right to use "smelting accounting" -- literally a million dollar question -- totally unmentioned not only in the contract but even in their proposals. This is particularly so when they were dealing with the government, a party not in the smelting business,

not negotiating an ordinary commercial smelting contract, and nowhere shown to be familiar with the special accounting practices adopted by some members of that industry.

We submit there is good reason why "smelting accounting" was not mentioned. It is inappropriate to the type of operation contemplated by these parties. This was not an ordinary competitive commercial smelting contract made in the context of a risky industry. On the contrary, it was for Hanna a risk-free, cost-reimbursable venture under which it stood to make enormous profit and the right (but not the obligation) to purchase a modern smelter at a fraction of its initial cost. In these circumstances, the complete absence of any reference to "smelting accounting" anywhere in the contract or anywhere in the contract proposals, we submit, conclusively demonstrates that the district court was plainly mistaken in ruling that the parties intended such practices to govern the contract in suit.

4. Hanna's contentions regarding the application of estoppel to this case are without merit.

A. Hanna's brief does not suggest--and indeed it was not the case--that anyone in the government's employ ever expressly approved of its application of "smelting accounting" practices to the contract in suit. On the contrary, Hanna acknowledges that it adopted these practices on its own. Rather, it notes that government auditors inspected its books in 1957, saw the accounting practices

being applied, and did not object to them. It is solely on this basis that Hanna urges, as to the period after January 1, 1958, that the failure of the government's auditors to object amounted to the government's "implied acquiescence" in Hanna's continued use of those accounting practices.

We pointed out in our opening brief, however, (pp. 86 ff.) that "implied acquiescence" by government employees is not enough to bar the government's claim, the Supreme Court having so held in circumstances far more egregious than those at bar. Utah Power & Light Co. v. United States, 243 U.S. 398, 409. To the same effect see this Court's decision in United States v. Riggins, 65 F. 2d 750, 751 (C.A. 9); and Fansteel Metallurgical Corporation v. United States, 172 F. Supp. 268, 271 (Ct. Cls.).[3/] Hanna does not dispute the authority of Utah Power & Light Co. Instead, it tries to avoid the impact of that decision by asserting that the case is of limited application and governs only "situation[s] involving an exercise of the sovereign power of the United States." (br. p. 44). In Hanna's view, the holding of Utah Power & Light Co. does not apply to this case where the government is attempting to enforce contract rights, which Hanna characterizes as merely "proprietary,

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3/ See also United States v. California, 332 U.S. 19, 39-40, and Beaver v. United States, 350 F. 2d 4, 7 (C.A. 9).

not sovereign" (br. p. 46). The short answer to that contention is that Hanna's purported "distinction" between "sovereign" and "contract or proprietary" rights has not been accepted by the Supreme Court, this Court and other courts of appeals. Thus, in Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, an agent of FCIC had erroneously misled respondents into the belief that they had contracted with FCIC to insure their wheat crop. In overturning a lower court decision that FCIC was precluded from denying such coverage because a private insurance company in similar circumstances would have been bound, the Court expressly rejected the distinction Hanna would have this Court make, ruling (332 U.S. at 383-384, emphasis supplied):

> And so we assume that recovery could be had against a private insurance company. But the Corporation is not a private insurance company. It is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures. Government is not partly public or partly private, depending upon the government pedigree of the type of a particular activity or the manner in which the government conducts it.

This Court both quoted and applied this language in United States v. Willoughby, 250 F. 2d 524, 530 (C.A. 9).

The dual nature of federal activities which Hanna espouses was also rejected in Fed. Land Bank v. Bismark Co., 314 U.S. 95. There it was urged that a State's tax on the money lending activities of land banks was constitutionally permissible because, though the banks were instrumentalities of the federal government, in making loans to individuals the banks were engaging in "proprietary" rather than "governmental" functions. In holding the State tax unlawful, the Supreme Court expressly rejected any such dichotomy in governmental activities (314 U.S. at 102):

> The argument that the lending functions of the federal land banks are propreitary rather than governmental misconceives the nature of the federal government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental.

Similarly, in United States v. 93 Court Corporation, 350 F. 2d 386 (C.A. 2, 1965), certiorari denied, 382 U.S. 984, the Second Circuit ruled that the doctrine of laches does not bar the United States from foreclosing a mortgage given to the R.F.C. as security for a business loan, also rejecting the distinction Hanna urges here by holding (350 F. 2d 389):

> This rule allows the government to maintain belated actions to enforce public rights regardless of the "governmental" or "business" nature of the government-sponsored activity that created the rights.

And in Aiken v. United States, 260 F. 2d 936 (C.A. 9), this Court squarely rejected the argument that the government could be barred from enforcing contractual rights against its lessee by failure to prosecute its claim diligently, stating (260 F. 2d at 938, emphasis added):

> Finally, appellant argues that the government waited too long in making its demand for payment. However, this action is in contract, and it is well settled that the United States may sue at any time upon a contract, and neither limitation nor laches binds it.

The reason why the distinction Hanna urges cannot be drawn is inherent in the very reason why negligence and laches cannot be imputed to the government. The classic explanation for the rule is that of Mr. Justice Story in United States v. Hoar, Fed. Cas. No. 15,373 (2 Mason 311, 26 Fed. Cas. 329, 330, D. Mass. 1821, emphasis supplied):

> The true reason, indeed, why the law has determined, that there can be no negligence or laches imputed to the crown, and, therefore, no delay should bar its rights, *** is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation, or exception, introduced for the public benefit, and equally applicable to all governments.

Clearly, that rule is equally applicable to protect the public Treasury regardless of the "sovereign", "governmental" or "proprietary" nature of the government activity which

created the right in suit. See, also, United States v. Summerlin, 310 U.S. 414, 416; United States v. Rossi, 342 F. 2d 505 (C.A. 9); McIndo v. United States, 194 F. 2d 602 (C.A. 9); Cf., United States v. DeQueen and Eastern Railroad Co., 271 F. 2d 597, 601, and cases cited. The authorities which Hanna cites, we submit, do not support its contrary contention. 4/

In addition, while we do not think it relevant, this is a situation involving an exercise of the "sovereign"

4/ United States v. Bostwick, 94 U.S. 53, dealt with the construction of a lease, not estoppel or laches; Krupp v. Federal Housing Administration, 285 F. 2d 833, (C.A. 1), was a suit on an express warranty made by the government in a contract to sell real estate, no estoppel was involved; in McQuagge v. United States, 197 F. Supp. 460 (W.D. La.), the government's contracting officer finally accepted and paid for certain work as completed according to contract specifications under a contract providing that such acceptance could not be reopened except on evidence of fraud not present in the case, no question of "implied acceptance" was involved; United States v. Certain Parcels of Land, 131 F. Supp. 65, involved reliance on the affirmative representation of a government employee with actual authority to settle the land controversy in suit, and in any event is of doubtful authority since this Court declined to follow that decision in the later case of Beaver v. United States, 350 F. 2d 4, 7, 9. Insofar as the Court of Claims in Branch Banking and Trust Co. v. United States, 98 F. Supp. 757, certiorari denied, 342 U.S. 893, and Roberts v. United States, Great American Insurance Co., 357 F. 2d 938, employed language supporting the proposition that the government may be estopped by an act of waiver in the same manner as a private contractor "when the government is acting in its propriatary capacity," that language is in conflict with the express contrary holding of the Supreme Court in Federal Crop Ins. Corp. v. Merrill, supra, and they are therefore incorrectly decided.

power of the United States notwithstanding Hanna's contrary assertions. As Hanna acknowledges (br. p. 2) the contract in suit was negotiated -- as a matter of "urgency" -- solely because "there was during the Korean War an acute shortage of nickel for critical defense needs, and no domestic source of supply". The government entered into this arrangement with Hanna not as an ordinary commercial venture, but to insure the United States' ability to obtain supplies necessary to the needs of national defense. It is disingenuous to imply that the government here expended more than thirty million dollars of public funds simply to enter the commercial nickel smelting business. (See our opening brief, pp. 2-4).

B. Hanna has also misconceived the thrust of our opening brief on the estoppel question. We agree that the court below cannot be said to have been "clearly erroneous" in finding that the government's auditors knew, or should have known, about Hanna's accounting practices as of January 1, 1958. However, Hanna is not correct in stating (br. p. 42) that we have abandoned the contention that the government could not be bound by their knowledge alone. Indeed, that is precisely the point we are making. Mere silence on the part of those auditors constituted at the very most "implied acquiescence" in Hanna's actions. And such "implied acquiescence" by itself, we demonstrated, is insufficient to preclude the United States from asserting its rights. In other words, this is a much stronger case than

one in which some government employee actually makes an erroneous misrepresentation. Here, no representations at all were ever made to Hanna by any government employee. And we certainly do not concede that anyone with actual authority to do so ever waived the government's rights under this contract or approved Hanna's accounting practices. The auditors had no such authority themselves. Hanna nowhere points to any evidence establishing that any person who did have such authority was even aware of Hanna's accounting practices in 1958, much less approved of them. The law is clear, we submit, that one who relies on the representations of a government agent must show that in fact the agent had actual authority to bind the United States. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380; United States v. Stewart, 311 U.S. 60, 70; Sutton v. United States, 256 U.S. 575; Whiteside v. United States, 93 U.S. 247, 256-257; Beaver v. United States, 350 F. 2d 4 (C.A. 9).

Nor does Carrier Corporation v. United States, 328 F. 2d 328, 164 Ct. Cls. 666, cited by Hanna, hold otherwise. In that case the majority of the Court of Claims found that the official with actual authority (an Assistant Secretary of the Army) had actual knowledge of the facts of the case and of the actions of his subordinates. It was his actual knowledge which the Court held to have bound the government to his subordinate's express representations. See 328 F. 2d at 337 and findings of fact 25-28 at 166 Ct. Cls. 709-710.

Imputed knowledge is not enough. Even assuming Carrier Corporation to have been properly decided on its facts (but see the dissenting opinion of Judge Davis at 328 F. 2d 339, 340-342), Hanna did not, and could not, make a comparable showing here. There is simply no evidence in this case -- and Hanna has cited none -- which establishes that anyone with actual authority to approve Hanna's accounting practices was at all aware of them, much less authorized their use under this contract. 6/

5/ See, Fansteel Metallurigical Corporation v. United States, 271 F. Supp. 268, 271 (Ct. Cls. 1959); United States v. Riggins, 65 F. 2d 750, 751 (C.A. 9); United States v. DePew, 100 F. 2d 725, 728 (C.A. 10); Jones v. United States, 106 F. 2d 888, 890-891 (C.A. 5); Halverson v. United States, 121 F. 2d 420, 422-423 (C.A. 7), certiorari denied, 314 U.S. 695; United States v. Cooper, 200 F. 2d 954, 956 (C.A. 9); United States v. Kiefer, 228 F. 2d 448, 450-451 (C.A.D.C.), certiorari denied, 350 U.S. 933; United States v. Sinor, 238 F. 2d 271, 276 (C.A. 5); United States v. Willoughby, 250 F. 2d 524, 528-531 (C.A. 9); United States v. Accardo, 113 F. Supp. 783, 785 (D. N.J.), affirmed on the opinion of the district court, 208 F. 2d 632 (C.A. 3), certiorari denied, 347 U.S. 952.

6/ Indeed, even if the contracting officer were aware of those practices his authority to approve them is doubtful. "The law is well settled that a contracting officer can change the terms of a contract to the benefit of the government but is not given authority to make a change which would adversely affect the Government." Fansteel Metallurigical Corporation v. United States, supra, 172 F. Supp. at 270 (Ct. Cls.).

C. Finally, we call to the Court's attention that, at all events, estoppel is at most a partial defense to the government's claim on the merits. As the district court's opinion notes (253 F. Supp. 793), $841,403.62 of the government's claim relates to capital equipment purchased by Hanna and charged to production costs before January 1, 1958, the date as of which the lower court found that government agents "impliedly acquiesced" in Hanna's accounting practices. Consequently, the government's right to recover the $841,403.62 in expenditures improperly made by Hanna before that date would not be barred by estoppel in any case.

ANSWERING BRIEF FOR THE UNITED STATES AS CROSS-APPELLEE

1. The district court correctly reformed the contract to express the true intent of the parties.

(a) Introduction and summary

Under the contract in question, Hanna was obligated to operate the smelter at maximum production and to deliver all the nickel refined to the government at its cost of production or at an agreed upon ceiling price, whichever was lower. This obligation was to continue until 125,000,000 pounds of nickel was delivered or until June 30, 1962, whichever occurred first. Hanna was required to decide by that time whether it would exercise its option to purchase the smelter. 7/

By the early 1961 Hanna had already delivered to the government all but approximately 19,500,000 pounds of nickel contracted for, leaving less than a full year's production still to be delivered. In February, 1961, Hanna manifested its desire to exercise its option to purchase the plant (pl. ex. 136-1D), but it also desired an extension of

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7/ See our main brief, p. 9, fn. 14, for the terms of the option.

several years in which to deliver the final amount of nickel in order to obtain "the opportunity to use most of the smelter's production during that period to develop a commercial nickel market." 8/ The government, while not opposed to an extension of delivery time per se, wished to protect itself against any rise in production costs which might follow should Hanna not run the smelter at maximum capacity during any extended delivery period. The government also wished to make sure that, by agreeing to an extension of the delivery period, it would not be deprived of the benefit of Hanna's lowering costs of production, which at this point had been decreasing annually.

To achieve these ends the parties negotiated Amendment 5 to the contract. In substance, the amendment extended Hanna's time to deliver the reamining refined nickel three years to June 30, 1965, and relieved Hanna of the obligation to run the smelter at the maximum practicable rate and to deliver all the product to the government. The remaining 19,500,000 pounds of nickel were to be delivered to the government over the extended period at Hanna's cost of production (as before), or at a new ceiling price of 58.77 cents per pound, whichever was lower. It is this new ceiling price which is in dispute here.

8/ Hanna's brief, p. 69.

The district court found (as the government had contended) that the new ceiling price "was computed by an agreed formula which was based upon the difference between the company's cost of production in 1959 and 1960" (253 F. Supp. at 795). The court found, however, that Hanna had improperly included in its 1959 and 1960 cost figures over two hundred thousand dollars of capital expenditures, the effect of which was to raise the ceiling price under the formula. The court therefore reformed the contract so as to compute a ceiling price by applying the true cost figures to the formula. The result was to lower the ceiling price some 1.24 cents to 57.53 cents per pound. Accordingly, the court awarded judgment to the government for $241,798.32, plus interest. 9/

In this appeal, Hanna does not challenge the district court's finding that it overstated its production costs by

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9/ Hanna actually delivered only some 2,186,409 pounds of nickel under the 1961 agreement. After this suit was instituted, the parties entered into a termination agreement in which Hanna paid the government the approximate difference between the 58.77 cents/lb. ceiling price and the market price of nickel for the remaining 17,313,454 pounds of nickel not delivered. They further agreed that if the court should reform the ceiling price downward, Hanna would pay the government an additional sum equal to 17,313,454 times the amount of the reduction. We do not understand Hanna to dispute that, if the decision of the court is affirmed, the mathematical computation of the court's award to the government is correct. See 253 F. Supp. at 796.

more than $215,000.00 (Hanna's brief, p. 56). Rather, it urges that the court erred in finding that the parties agreed on a formula for computing the 1961 ceiling price. In Hanna's view, the parties agreed only upon a new, fixed ceiling price. Accordingly, though that price was expressly computed on the basis of Hanna's own improperly inflated 1959 and 1960 costs of production, Hanna asserts that the court was not entitled to reform the contract to reflect the true cost figures. We respectfully submit that Hanna's challenge to the court's decision on this issue should be rejected. For as we now show, the evidence supports the court's finding that the parties agreed to compute a new ceiling price by use of a formula, and the court properly reformed the contract to conform to the formula which the parties intended to apply.

(b) The meaning of the 1961 Amendment was a question of fact for the district court; its resolution of that issue must be upheld because not "clearly erroneous."

It is elementary that a written agreement which, through mutual mistake, fails to express the intention of the parties may be reformed to express that intention. Restatement of the Law of Contracts, § 504. As the Supreme Court long ago stated, "[t]he jurisdiction of equity to reform written instruments, where there is a mutual mistake, or mistake on one side and fraud or inequitable conduct on the other, is undoubted; ***." Simmons Creek Coal Co. v. Doran, 142 U.S. 417, 435 (1892). In this case, the district

court found that the parties mutually intended that the new ceiling price for nickel established under Amendment 5 be computed according to a formula which compared Hanna's 1960 costs of production with its 1959 costs, and that the amendment mistakenly applied incorrect cost figures for those years. On this basis the court reformed the contract by substituting the correct figures in the formula. The district court's findings regarding mutual intent and mutual mistake are ones of fact which this Court has held may not be set aside unless "clearly erroneous". Lundgren v. Freeman, 307 F. 2d 104, 113 (C.A. 9).[10/] In this case, there is ample support in the record for the trial court's findings on the parties' intent and mistake. The court's decision on the reformation issue must, therefore,

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10/ It is equally well established that where extrinsic evidence is introduced in aid of interpreting provisions of a written instrument -- as in this case -- the question of interpretation is one of fact for the trier of facts. West v. Smith, 101 U.S. 263; Rankin v. Fidelity Trust Co., 189 U.S. 242, 252-253; Pacific Portland Cement Co. v. Ford Mach. & Chem. Co., 178 F. 2d 541, 549 (C.A. 9); Lowell O. West Lumber Sales v. United States, 270 F. 2d 12, 17 (C.A. 9); Williston on Contracts (3rd Ed.) § 616. See also, United States v. A. J. McKinnon, 289 F. 2d 908 (C.A. 9), reversing 178 F. Supp. 913 (D. Ore.).

be affirmed. For, as this Court has stated in a case presenting striking parallel circumstances:

> We may not substitute our judgment [as to whether a contract should be reformed] if conflicting inferences may be drawn from the established facts by reasonable men, and the inferences drawn by the trial court are those which would have been drawn by reasonable men.

Lundgren v. Freeman, supra, 307 F. 2d at 113 (C.A. 9).

(c) The district court was not mistaken in finding that the parties agreed upon a formula for determining a new ceiling price for nickel in the 1961 amendment to the contract.

Hanna initiated the proposal to extend the delivery periods and terminate the contract, offering to supply the government the remaining nickel contracted for at 60 cents per pound or its actual cost of production, whichever was lower (Pl. Ex. 126-1D and 4D). As we noted, Hanna was already under contractual obligation to the government to supply that nickel at its cost of production. Thus, as far as the government was concerned, the significant part of Hanna's offer was the 60 cent ceiling price.

During the negotiations which followed Hanna's offer, the government was represented by Mr. James V. O'Dwyer (Pl. Ex. 136). Hanna's offer was rejected by the government because, as Mr. O'Dwyer testified (Pl. Ex. 136, p. 15), Hanna's operating costs had been descending over the years and, "should operations under the contract continue normally and

the material being produced at capacity in twelve to fifteen months, we could certainly expect to have the benefit of a lower -- a price lower than 60 cents." In other words, the government negotiators were of the view that if Hanna continued to operate the plant at full capacity its production costs -- and thus the cost of nickel to the government -- would drop below 60 cents per pound. They wished the government to retain the advantage of these projected lower costs notwithstanding any agreement which extended delivery dates and authorized Hanna to operate the smelter at production levels less efficient than full capacity. To achieve that goal, Mr. O'Dwyer testified, the government negotiators took the approach that the ceiling price should be determined by taking "the actual difference between the 1959-60 costs and deduct that" from the 60 cent figure proposed by Hanna (Pl. Ex. 136, p. 15).

Mr. O'Dwyer further testified that he obtained those 1959 and 1960 costs from figures "supplied by the Hanna Nickel Company", that he used them to compute the government's proposals for a new ceiling price under the formula mentioned, that he drafted a letter from the Acting Commissioner of Defense Materials to Hanna embodying the government's counter-proposal (id. at 16), and the proposal in that letter is computed under the formula described (id. at 17). That letter, which both explains and illustrates the formula under which the government was prepared to agree

to an extension of the delivery period, reads in pertinent part as follows (Pl. ex. 136-5D, emphasis added):

> We are agreeable in principle to the development of a mutually satisfactory arrangement under which the aims expressed in your communication will be accomplished. It is essential, however, that the Government satisfy itself insofar as it is possible to do so that it will not pay any more for the ferronickel to be delivered over the period of 4 1/2 years than it would pay were the material to be delivered over the course of the next year to 15 months as provided in our Contract DMP-50. To this end we call your attention to the inclusion of non-recurring charges in 1959 and 1960 and to a net reduction in production costs for the calendar year 1960 as compared with that of 1959 of 1.2 cents per pound, calculated as follows:

	Cost Per Lb.
Average for calendar year 1959	$ .6130
Less: Storage Cost 1959 $26,292.64	.0013
Adjusted Average for 1959	$ .6117
Average for calendar year 1960	$ .6001
Less: Storage Cost 1960	.0004
Adjusted Average for 1960	$ .5997
Reduction in cost from 1959 to 1960	$ .0120
Adjusted average for calendar year 1960	$ .5997
Less Reduction in cost from 1959 to 1960	.0120
Projected Costs for Balance of Contract	$ .5877

> We think it is reasonable to project a production cost for 1961 at $ .5877 per pound, and that this is a necessary precaution on the part of the Government since it has been indicated to us that during the next 12 to 15 months you may not find it practicable to operate at capacity.
>
> Subject to a satisfactory adjustment of all the other conditions of your proposal, with respect to which we think there will be no problem, we are willing to execute such amendatory agreements as are necessary to consummate the transaction on the

> basis of $ .5877 per pound or your actual average cost of production during the year in which the ferronickel is delivered to the Government, whichever is lower. This contemplates that the proposed agreements will be effective as of March 31, 1961.

The government's letter thus sets out with precision the formula and figures used. The proposed ceiling price of 58.77 cents mentioned in the letter was determined, as the Court can easily check, by simple mathematical application of the formula.

Hanna responded by letter dated March 14, 1961 (Pl. Ex. 136-6D, emphasis added):

> This is to advise you that Hanna Nickel Smelting Company accepts the proposal set forth in your letter of March 9 in regard to terminating Contracts DMP-49, DMP-50 and DMP-51, and substituting therefor provisions to extend to June 30, 1965 the balance of deliveries under present Contract DMP-50 at a price of $ .5877 per pound of contained nickel or our average cost of production per year, whichever is lower. Your proposal contemplates that these arrangements will be effective as of the end of this month.
>
> I assume that you will arrange to have prepared and furnished to us drafts of the appropriate agreements to carry out these understandings.

It is on the basis of the government's proposal, and Hanna's acceptance of that proposal, that Amendment 5 to the contract is to be understood. That Amendment reads in pertinent part:

> * * * The 19,499,863 pounds of contained nickel shall be produced by the Contractor after March 21, 1961 and shall be delivered to the Government at such time or times after March 31, 1961 and prior to June 30, 1965 as the Contractor

> in its sole discretion shall determine, at a price per pound of contained nickel which shall be equal to (a) the Contractor's average actual cost of production per pound of contained nickel in the calendar year in which such ferronickel is delivered to the Government or (b) $0.5877, whichever is less.

On the basis of this evidence, the court below found that the ceiling price of 58.77 cents per pound adopted by the parties in Amendment 5 "was computed by an agreed formula which was based on the difference between the Company's costs of production in 1959 and 1960." The court having also found that Hanna had erroneously included in those cost figures matters which should not have been expensed (a finding which Hanna does not challenge), decreed that: "The 1961 agreement will be reformed by applying the Company's costs for 1959 and 1960, as adjusted to conform to this opinion, to the formula employed at the time of the original agreement" (253 F. Supp. at 795).

Hanna urges that the court erred in finding that it had intended to agree to a formula to determine a new ceiling price. The substance of its contention is that it was assenting only to the figures (i.e., 58.77 cents) contained in the letter, and that reformation was not appropriate because there was no mutual mistake about that figure. But as its letter states Hanna gave its assent to the government's proposal, and that proposal was plainly based on the formula in the letter. To be sure, the government's proposal did not use the word formula. But the letter set

out the formula itself and specified that it was being used "to project a production cost for 1961" because, if the contract delivery period were extended, Hanna "may not find it practicable to operate at capacity", thus precluding the possibility of determining Hanna's actual production costs while operating at maximum efficiency for 1961.

In sum, we submit there can be no doubt from the face of the letter itself, that the government was proposing a new ceiling price based on a formula -- expressly illustrated in that letter -- to protect itself because Hanna's actual future production costs might be increased for reasons relating to its search for commercial markets and not because of its operations in supplying nickel to the government. And there can also be no doubt that the government's proposed formula intended to use Hanna's actual costs for 1959 and 1960. It simply makes no sense to assume that the parties were negotiating on any other basis, for the formula is meaningless if the crucial "cost" figures are assumed to include capital expenditures.

We think the foregoing review of the evidence firmly supports the court's finding that the parties negotiated a formula for a new ceiling price, and that the court did not err in reforming the contract to reflect the true figures which the parties intended to use in the formula. At all events, however, that evidence provides ample basis on which the court below could reach a conclusion to that effect.

Even if another court might differ on the inferences to be drawn from the evidence, it would not be grounds for rejecting the lower court's decision here. For, as this Court has stated, in such circumstances "it cannot be said that the conclusion reached by the trial court is clearly erroneous." Pacific Portland Cement Co. v. Ford Mach. & Chem. Corp., 178 F.2d 541, 549 (C.A. 9).

Nor is there merit to Hanna's alternate contention that the trial court's decision to reform the ceiling price is a "gross inequity." (Br. p. 80). Surely there is nothing inequitable about refusing to give effect to $215,110 in "costs" which, as the court below particularly noted, "the Company's [own] witnesses frankly admit to be capital items under the [smelting] accounting practices previously discussed" (253 F. Supp at 792), a conclusion which Hanna does not challenge here.

For the reasons stated, we submit that the court's decision on reformation is correct and should be affirmed.

2. The district court did not abuse its discretion in awarding prejudgment interest to the government.

The district court awarded judgment for $231,506.28 to the United States in compensation for capital expenditures which Hanna had improperly charged to the United States as reimbursible production costs (see 253 F. Supp. at 796). Hanna does not challenge this portion of the judgment, but does dispute the court's award of prejudgment interest. Hanna tacitly recognizes (br. 81) -- as indeed it must -- that prejudgment interest is a matter within the district court's discretion to award in appropriate circumstances. 11/ Hanna contends, however, that prejudgment interest was "inequitable" in this case because the amount it owed the government was "unliquidated" and "essentially incapable of ascertainment before trial" (br. 82). Hanna's arguments on this point, we submit, are plainly without merit.

a. The court awarded judgment to the government only for these items which Hanna's own witnesses "frankly admit[ted] to be capital items under the [smelting] accounting practices previously discussed" (253 F. Supp. at 792), and which the district court found that the Company had "expensed in 1960 and 1961 solely to obtain reimbursement" from

---

11/ Funkausen v. Preston Co., 290 U.S. 163; Miller v. Robertson, 266 U.S. 243, 258; United States v. U.S. Fidelity Co., 236 U.S. 512, 528; Continental Oil Co. v. United States, 184 F. 2d 802, 822 (C.A. 9), 5 Corbin, Contracts, § 1046 (1964 ed.); McCormick, Damages, § 54 (1935 ed.).

the government. (id. at 793). Hanna does not challenge those findings. In other words, Hanna had no accounting excuse for billing and accepting payment from the government for these capital items. Thus, from the moment the government paid for them, Hanna had the use of the government's money without justification. The courts have long recognized that one who has made an overpayment to another, or one who has been underpaid, is entitled to interest from the date of the erroneous payment. Ardelphia Co. v. St. Louis S. W. Ry. Co., 249 U.S. 134; Mitchell v. Riegal Textile, Inc., 259 F.2d 954, 956 (C.A.D.C.). Hanna was under a legal duty to return the overpayments to the government when they were received. At that time the government had had a right of action to recover the money and a matured and liquidated debt became immediately due.

Moreover, there is no doubt that the debt was certain and liquidated. The amount of the government's claim was easily ascertained by simple mathematical computation. As stated in McCormick, Damages, supra, p. 216:

> [W]here the amount sued for may be arrived at by a process of measurement of computation from the data given by the proof, without any reliance upon opinion or discretion after the concrete facts have been determined, the amount is liquidated and will bear [pre-judgment] interest. See also 5 Corbin, Contracts, supra, §1046, p. 284.

In this case, there has never been a dispute between the parties about the correctness, arithmetically, of the amount of the government's claim. All parties have accepted and

agreed to the amount of each individual item in issue as evidenced by Plaintiff's Exhibit 82. In this respect there is no difference between this litigation and a lawsuit where the plaintiff is suing the defendant on two notes of $1,000 each. In both instances the amount controversy is fixed, certain and liquidated; the only area of dispute is defendant's liability on each item. That Hanna denied its liability to the government does not transform the claim to one for an unliquidated amount, just as the denial of liability by the maker of the hypothetical $1,000 notes does not compel the classification of that suit as a claim for an unliquidated sum. As the Tenth Circuit held in Anderson-Prichard Oil Corporation v. Parker, 245 F.2d 831, 837:

> The fact that defendant, in good faith, denies the claim or the breach of contract does not prevent the allowance of interest. Restatement, Contracts, §337, comment (d); 12/ United States v.

12/ Restatement, Contracts, §337, comment (d), states: "The fact that the defendant in good faith denies the existence of the debt or other duty asserted by the plaintiff, or denies that he has committed any breach of contract, does not prevent the allowance of [pre-judgment] interest as damages for his breach."

Stephanidis, D.C. E.D.N.Y., 41 F.2d 960; Hansen v. Covell, 218 Cal. 622, 24 P.2d 772, 89 A.L.R. 670; Lacy Mfg. Co. v. Gold Crown Mining Co., 52 Cal. App.2d 568, 126 P.2d 644; Texas Co. of Mexico, S.A. v. Roos, 5 Cir., 43 F.2d 1, certiorari denied 282 U.S. 902 51 S.Ct. 216, 75 L.Ed. 794.

See also, McCormick, Damages, supra, pp. 215-216.

The rule could hardly be otherwise, for if it were, by the simple expedient of denying his liability, a defendant could easily avoid the payment of prejudgment interest and thereby retain the plaintiff's money without charge. 13/

13/ The same considerations, we submit, also justified the court's award of prejudgment interest on the reformation claim. The contract was reformed because the production cost figures Hanna supplied included the identical unjustifiable capital expenditures discussed. Here, too, as a result of its own unjustified action, Hanna caused the government to overpay for nickel, and the government is entitled to be fully compensated for the use of its money.

b. Moreover, even assuming, arguendo, that the government's claim was not liquidated, the district court nonetheless was acting within its discretion in allowing prejudgment interest as part of the government's damage award. The Supreme Court has recognized (Concordia Ins. Co. v. School Dist., 282 U.S. 545, 554-556):

> * * * that even in a case of unliquidated damages, "when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages." Miller v. Robertson, 266 U.S. 243, 257-259, and cases cited. See also Standard Oil Co. v. United States, 267 U.S. 76, 79; Berhard v. Rochester German Ins. Co., 79 Conn. 388, 397.

That rule has regularly been applied in instances where, though the exact amount due was not ascertainable until trial, the court in its discretion believed prejudgment interest appropriate in order to provide full compensation to the injured party. See, e.g., St. Paul Mercury Indemnity Co. v. United States, 201 F. 2d 57, 60-62 (C.A. 10); E. I. Dupont De Nemours & Co. v. Lyles & Long Const. Co., 219 F. 2d 328, 341-342 (C.A. 4); Railroad Credit Corporation v. Hawkins, 80 F. 2d 818, 825-826 (C.A. 4), certiorari denied, 298 U.S. 667; Clarke Baridon, Inc. v. Merritt-Chapman & Scott Corp., 311 F. 2d 389 (C.A. 4). Here, the district court plainly considered the interest award as necessary to make whole the government's loss as a result of Hanna's use of its money, stating (253 F. Supp. at 796, emphasis added):

> This is a classic case of unjust enrichment. From the dates of overpayments, the Company has had the use of the Government's money. The amounts of the overpayments, as well as the dates, have always been subject to ready calculation, once the existence of a breach was determined. I have held that the Company breached the contract only in those instances where it was unable to justify its accounting decisions under the standard of generally accepted accounting practices. The Government is entitled to interest at the rate of six per cent per annum from the dates of overpayment, both on the $231,506.28 overpaid under Contract DMP-50 and on the $27,111.49 overpaid under the 1961 agreement.

We respectfully submit that the Court's decision in Continental Oil Co. v. United States, 184 F. 2d 802 (C.A. 9), a case in which a defendant similarly opposed the government's prejudgment claim for interest in a breach of contract suit on the ground that the claim was "unliquidated", is fully applicable here. The court there stated (184 F. 2d at 822):

> It is our view that it was for the trial court to determine as a question of fact the amount of the Government's loss on this item. We think it was a situation such as that discussed in Miller v. Robertson, 266 U.S. 243, at page 258, 45 S. Ct. 73, at page 78, 69 L. Ed. 265, where the court said: "Generally, interest is not allowed upon unliquidated damages. * * * But when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages."
>
> The rule permitting an award of interest "in the discretion of the court" is one of general recognition. Restatement of the Law of Contracts, § 337(b). Such a discretion, in a proper case, may be that of judge or of jury, but like other questions of the amount of damages, it is a question for the trial court, and it is its discretion that has been exercised here. We are not permitted to disturb it, for we think the court might properly conclude that the Government could not otherwise be made whole in respect to what it lost * * * .

In the instant case, as in Continental Oil, the government was deprived of the use of its money solely as a result of the defendant's conduct. Here, as there, the district court awarded prejudgment interest in order to make the government whole. In this case, as in Continental Oil, the award was a proper exercise of the trial court's discretion which should not be disturbed on appeal.

CONCLUSION

For the reasons stated above and in our main brief: (1) to the extent the judgment of the district court denies the United States the relief sought, it should be reversed and the case remanded to the district court for the entry of an additional judgment against the appellees in the amount of $1,168,671 (or, if the Court adopts the Government's alternative position, in the amount of $1,145,241) together with interest at 6 percent per annum from the dates of the overpayments until the judgment is paid; [14/] and (2) to the extent the judgment of the district court awards the United States the relief sought, it should be affirmed and the judgment entered in this Court, pursuant to Rule 24(1) of

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14/ See note 55 on page 93 of our main brief.

the Court's rules, for interest on the judgment below from April 27, 1966 (the date of entry of the judgment) until it is paid. 15/

Respectfully submitted,

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DECEMBER 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Richard S. Salzman
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Attorney.

15/ See note 56 on page 94 of our main brief.

AFFIDAVIT OF SERVICE

CITY OF WASHINGTON)
DISTRICT OF COLUMBIA) ss.

RICHARD S. SALZMAN, being duly sworn, says:

That on December 4, 1967, he caused three copies of the foregoing reply brief for the United States as appellant and answering brief as cross-appellee to be served upon appellees, cross-appellants by placing them in the United States Mail, air mail postage prepaid, in an envelope addressed to counsel as follows:

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Subscribed and Sworn to before me this 4th day of December, 1967.

[Seal]

NOTARY PUBLIC

My Commission expires April 14, 1972.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

HANNA NICKEL SMELTING COMPANY, a corporation, and THE HANNA MINING COMPANY, a corporation,

Appellees.

FILED

AUG 7 1967

WM. B. LUCK, CLERK

HANNA NICKEL SMELTING COMPANY, a corporation, and THE HANNA MINING COMPANY, a corporation,

Cross-Appellants,

vs.

UNITED STATES OF AMERICA,

Cross-Appellee.

On Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

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AND
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AUG 1967

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 21,232

UNITED STATES OF AMERICA,

Appellant,

vs.

HANNA NICKEL SMELTING COMPANY, a corporation, and THE HANNA MINING COMPANY, a corporation,

Appellees.

On Appeal from the United States District Court for the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

APPELLEES' ANSWERING BRIEF

STATEMENT OF JURISDICTION

Appellees (collectively called "Hanna") adopt the overnment's statement of the jurisdiction of the District Court nd of this Court (Gov Br 1-2).

STATEMENT OF THE CASE

. Introduction[1]

As indicated in the Government's brief (at 2-11; see R

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1. The statement which follows is believed to be sufficient for the Court's consideration of the questions presented by the Government's appeal. However, a more complete statement of the facts, with appropriate citations to the record, is set forth in Appendix C hereto, pp 97-108 below.

215-217), there was during the Korean War an acute shortage of nickel for critical defense needs, and no domestic source of supply Hanna[2] owned the only known U.S. deposit, but the process for refining its particular chemical composition into useful ferro-nickel[3] was experimental and had not been proved out in a pilot plant. The urgency was such that the Government insisted on assuming the risk of by-passing the pilot plant stage and contracte with Hanna as follows: (1) The Government would buy enough nickel ore, at a fixed price, to produce a minimum of 95 million and a maximum of 125 million pounds of nickel in ferro-nickel; (2) the Government would lend Hanna up to $22 million in the form of capita advances (plus necessary working capital) to build and operate a full scale smelter, which the Government would take over in cancellation of the loan if the process proved not feasible; and (3) if the process proved feasible, Hanna would produce and sell 95-125 million pounds of nickel to the Government at Hanna's cost of production, plus the number of cents per pound (applicable to the first 95 million pounds) sufficient to amortize and repay the $22 million smelter loan with interest.

The process was made to work; the Government acquired 108 million pounds of nickel; all of its loans for facilities and

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2. The term "Hanna" includes Hanna Nickel Smelting Company and The Hanna Mining Company which was joined as an additional defendant on a guarantee in a related contract. Defendants are referred to collectively as "Hanna" for purposes of simplification.

3. Ferro-nickel produced from this ore consists of approximately 45% nickel and 55% iron. See Pl Ex 85, p 200 and Def Ex 98, p 1. It is used primarily in the manufacture of stainless steel.

working capital plus interest having then been repaid, Hanna took clear title to the smelter by making a residual payment as provided in the contract in the negotiated amount of $1.7 million. Thereafter Hanna bought out its obligation to deliver the remaining 17 million pounds by paying to the Government $2,175,000.[4]

4. The question of the profitability of the contractual arrangement, which the Government concedes to be irrelevant to the issues below and here (Gov Br 11), was intentionally avoided on the trial (Oct Tr 124, 125; July Tr 226), and for that reason the record does not contain a definitive exhibit showing the economic effect of the transaction as a whole. However, the Government's extensive and prejudicial references in its brief (Gov Br 3, 8, 9, 10, 11) to the profitability of the transaction to Hanna justify and require the assembling of such evidence as the record does contain on the economics of the whole transaction from the Government's standpoint, as follows:

   The Government purchased 107,686,000 pounds of nickel (105,500,000 as of March 31, 1961 and 2,186,000 pounds thereafter, R 298, 299) for a total outlay of $98,329,000 (capital advances of $22,300,000 plus working capital advances of $69,945,000 (R 298), plus interest of $4,799,000 on these advances (Def Ex 77, G and I), plus $1,285,000 for 2,186,000 pounds purchased after March 31, 1961 at 58.77¢ per pound (R 298, 299)). During the period 1955-1957 the Government resold to industrial users 30,341,000 pounds of Hanna nickel for a total of $35,792,000 (Def Ex 82, p 20), or an average of $1.18 per pound, leaving it with 77,345,000 pounds and an unrecovered outlay of $62,537,000. From this remaining outlay must be deducted Hanna's residual payment of $1,722,000 in respect of the smelter and its payment of $2,175,000 to buy out its remaining obligation to deliver 17,314,000 pounds of nickel which the Government did not need (R 298, 299; Def Ex 98, p 2), leaving a total net Government outlay of $58,640,000 for the remaining quantity of 77,345,000 pounds, or 75.8¢ per pound.

   The market price of nickel in ferro-nickel per pound (f.o.b. Riddle, Oregon, subject to reduction for freight equalization with that from Port Colborne, Ontario -- approximately 3¢ per pound to Eastern markets) at the date of the final termination of DMP-50 on March 5, 1964, was 75 1/4¢, and in recent months has been 82 3/4¢, as published in American Metal Market. That Hanna should have made a substantial profit while providing the Government with 77,345,000 pounds of nickel for a net remaining Government outlay per pound, at the final termination of the contract, in the vicinity of the market price, proves only that a commercial nickel deposit is a very valuable property. No one has yet suggested that Hanna was under obligation to make its nickel available to the Government at less than market value.

Toward the conclusion of the contract, during the Gover ment's 1961 audit of Hanna's 1960 costs, a dispute had arisen and was being negotiated between Hanna and the Government over the propriety of Hanna's charging items costing $210,605 to cost of production, and the Government made a claim on Hanna for a refund of that amount, expressly on the ground that the charges were not properly part of cost of production under generally accepted accounting principles (Def Ex 125). During nine years of contrac performance, no doubt had entered anyone's mind that this was the standard to be applied, as attested by unbroken record references (see pp 30-33 below).

Before negotiations over the $210,605 claim were conclu came the widely-publicized investigation by a subcommittee of the Senate Armed Services Committee of the Government's stock-piling program, including the Hanna contracts (see R 261-266). This was naturally followed by a GSA reaudit of DMP-50 -- the smelting contract -- (although it had been thoroughly audited annually by GSA during performance) and the submission by the Government to Hanna thereafter of a claim for $1,739,328 based on the 284 items of expenditure on which this suit was subsequently filed (R 211; P1 Ex 61). The Government claimed that these items were improperly expensed and charged to cost of production and should have been, but were not, capitalized and made the subject of capital advances under the contract.

The Government appears to have recognized from this time forward, however, the great difficulty of sustaining any suc disallowances under the previously applied standard of generally accepted accounting practice, and the consequent necessity of

somehow constructing a different theory and standard.

Its position has suffered ever since from the discomfort that so often attends the necessity to evolve and defend theories that are in essence after-thoughts which do not correspond to what governed the action of the parties during the transaction: Inconsistencies develop, which require further modification, which develop further inconsistencies, and so on.

The first Government position that emerged to justify the original challenge of 284 items in this suit was that the contract contains its own accounting standard and that the words "cost of production" in the price provision of the contract exclude all "replacements or improvements," because, it said, all replacements and improvements (not just those that are capitalizable under generally accepted accounting practice) are eligible for capital financing under Article VI(1). It followed, in the Government's new view, that "generally accepted accounting practices may not be employed to decide whether replacements or improvements are cost of production." (July Tr 5)

But this simplistic theory had to be modified, among other reasons, to accommodate as part of "cost of production" the replacement of items such as light bulbs and, finally, of any other items, some of them costing as much as $20,000 to 40,000 each (e.g., Items 114, 171, 172, 263/274, P1 Ex 90); and at the second trial the Government, on the advice of its own accounting witness, Dr. Wright, abandoned $346,222 of its claim relating to 68 replacements or improvements that he conceded were properly charged to cost of production (R 334, 378; July Tr 7, 37). But if some "replacements or improvements"

are properly charged to cost of production, why not others, and where and how is the line to be drawn -- if not by reference to generally accepted accounting standards?

So a more complicated further modification of the Government's theory emerged, which has to some extent survived, making involved distinctions between "items," "components," and "improvements" (Gov Br 43-44; see July Tr 48-50), based only remotely, if at all, on the language of the contract and retreating from time to time to the alternative offered by Dr. Wright's testimony, that the result of this so-called contractual standard in any event differed very little from the conclusions that he would reach based on generally accepted accounting principles (July Tr 37-38, 41; Gov Br 18, 77-81).

Now, however, the Government is confronted with the trial court's acceptance of the overwhelming weight of the expert testimony of four of the nation's most eminent accountants to the effect that (1) this contract, unlike other Government forms, does not provide its own set of cost accounting standards; (2) by reason of its ambiguity in this respect, recourse to generally accepted accounting practice is necessary; and (3) applying such practice, Hanna's accounting was correct (except that Judge Solomon disallowed charges to cost of production amounting to $231,506, which are not in dispute on this appeal and which, it should be noted, involved principally the items -- costing $210,605 -- that were under negotiation between the parties in early 1962, before this dispute arose).[5]

So now we are faced in the Government's brief with a

5. Compare Exh B to Def Ex 77 with Pl Ex 82, Items 131, 107/12 and 130.

still further adjustment of position which for the first time suggests the following theory: Even though the parties may have contemplated that cost of production would be determined in accordance with generally accepted accounting practice, the testimony of Hanna's accounting witnesses is wide of the mark, and the court below erred in relying on it, because from time to time these witnesses spoke of generally accepted accounting practice as applied in the smelting industry (Gov Br 78-81) -- this in the teeth of the fact that DMP-50 is a smelting contract and the record makes clear that generally accepted accounting practice cannot be divorced from the practical facts of the business to which it applies.

2. Summary Statement of the Case

Under a contract executed January 16, 1953 with the Government, a nickel smelter was developed and operated in Oregon by Hanna Nickel Smelting Company. The contract ("DMP-50") was one of three related contracts between Defense Materials Procurement Agency (DMPA) and subsidiaries of The M. A. Hanna Company under the Defense Production Act of 1950 (R 215-217).

Contract DMP-50 provided that Hanna, with money advanced by the Government, would construct and operate a smelting facility using an experimental French refining process. Hanna agreed to purchase nickel ore from the Government (for the price the Government paid to The Hanna Mining Company for the ore under Contract DMP-49,

under which Hanna Mining opened and developed its nickel bearing ore deposit), to process the ore and to deliver the product up to 125,000,000 pounds of contained nickel in ferro-nickel to the Government by June 30, 1962 (R 216; Def Ex 82, pp 13-14).

The funds advanced by the Government for construction and operation of the smelter were to be repaid by delivery to the Government of the smelter's product -- ferro-nickel -- at a price which was to be credited against the advances. The contract provided for two kinds of advances: (a) Capital Advances, on which there was a ceiling and Government approval was required for expenditures, and (b) Working Capital Advances, on which there was also a ceiling, and which operated as a revolving fund to finance the cost of production (Article VI). The contract provide for two corresponding elements in the price of each pound of nicke produced: (a) an amortization factor, calculated to repay capital advances over the first 95,000,000 pounds of nickel produced, and (b) a cost-of-production factor (on which there was also a ceilin arrived at by prorating, over the pounds of nickel produced, non-capital costs which had been financed in the first instance by working capital advances (Article VIII). This litigation arises out of a dispute over the cost-of-production factor.

The contract continued in force from 1953 to 1964 with various amendments. After initial construction and experimentation, the smelting process eventually proved technically feasible. By 1958 the smelter was producing at an annual rate of over 20,000,000 pounds of nickel (Def Ex 82, pp 16-17). The important national purpose of DMP-50 and the related contracts wa

fulfilled: The Government acquired a firm domestic supply of nickel (Def Ex 82, p 4). Despite the difficulties inherent in a crash program (July Tr 218A), Hanna admittedly did everything it could to reduce production costs payable by the Government (Oct Tr 94, 196; Pl Ex 93; Def Ex 30, 10/9/58 at p 2, 12/9/58 at p 2) and, as a result, the Government's total net outlay for Hanna's stockpile nickel was and is in the vicinity of or below its market price (fn 4 above; Def Ex 98, p 2).

Between 1953 and 1961 the Government made, in the aggregate, capital advances to Hanna of $22,300,000 and working capital advances of $69,945,000. As of April, 1961 all of these advances had been repaid with interest, and 105.5 million pounds of nickel had been delivered to the Government (R 298; Pl Ex 87, 88). As above indicated, the amount of those advances determined the price of the nickel, and the method of repayment was by crediting the price of the nickel against them. At this point Amendment 5 to the contract was negotiated by the parties -- whereby Hanna made to the Government the above-described residual payment of $1.7 million to discharge the mortgage on the smelter; a lower ceiling price (58.77¢ per pound) was established on the remaining 19.5 million pounds of nickel, and the delivery schedule on this nickel was extended (R 217, 298-299; Pl Ex 59). By 1964, an additional 2.2 million pounds had been delivered (R 299; Pl Ex 21), the market price of nickel was higher than the contract ceiling price and the Government did not desire further nickel for the stockpile (Def Ex 98, p 2). Accordingly, by negotiated agreement Hanna paid the Government $2,175,000 to release the

obligation to deliver the balance (R 299, P1 Ex 3).

In this action, the Government contends that 216 items (out of 284 items originally contended for) in the total amount of $1,392,377 -- roughly 2% in value of the thousands of items which were treated as costs of production -- should instead have been capitalized and treated under the capital advance route. The principal issue is whether Hanna's accounting treatment of these items as expense rather than capital was proper. This issue turns essentially on whether (a) the contract has self-contained cost accounting standards which require capitalization of additions, modifications, replacements or improvements of the smelter -- as the Government contends; or (b) the applicable standard for capitalizing or expensing is generally accepted accounting practice -- as Hanna contends and as the trial court held.

On this principal issue, the District Court found (the two opinions of the District Court are reported at 253 F Supp 784) that the contract does not present a self-contained accountin system, that its provisions as to what is to be expensed and what capitalized are ambiguous, and that it is necessary to look to generally accepted accounting practice. The court further found that under generally accepted accounting practice the company's accounting treatment of 178 items, amounting to $1,160,871, was proper; and that as to 38 items, amounting to $231,506, its accoun treatment was not proper (R 382-389, 465-466). (On these appeals, t court's decision as to the $231,506 is not challenged.)

The Government in its appeal challenges the rejection of its claim as to the $1,160,871, contending that the contract conta

its own cost accounting standards, under which the items were required to be capitalized; and, alternatively, that if generally accepted accounting practice governs, the expert evidence showed that under such practice most of the items were required to be capitalized.

The District Court also held, alternatively, that estoppel barred the Government from asserting its claim as to the part of the $1,160,871 expended after 1957 -- because the Government through its auditors knew of the accounting practices now in dispute but failed to protest at any time, leading Hanna to continue using the practices and to increase its exposure (R 390-395). In its appeal the Government challenges this alternative holding.

Separately, the Government sought reformation of the 1961 amendment to the contract (which fixed a new ceiling price of 58.77¢ per pound for the remaining 19.5 million pounds of nickel) -- on the theory that the amendment employed an "agreed formula" based on the difference between Hanna's costs of production in 1959 and 1960, and that hence the amendment should now be "reformed" to reflect the 1959 and 1960 costs as changed by eliminating items of those years to the extent successfully challenged in the main claim. The District Court agreed with the Government's reformation theory, and applied it to reflect 1959 and 1960 costs of production after eliminating the items held to have been improperly expensed in those years. On this basis the court awarded the Government $241,798 on its reformation claim (R 395-396, 466-467).[6] In its

6. Since the Government's main claim on appeal includes certain 1959 and 1960 expenditures, the Government contends that it will be entitled to an additional $7,800 by way of reformation if its appeal is sustained with respect to those expenditures (Gov Br 46-47).

cross-appeal, Hanna challenges this award in toto, contending that there was no factual or legal basis for reformation to reflect an agreed formula rather than the agreed figure.

Additionally, the District Court awarded prejudgment interest to the Government, from the dates of payment on the items held to be improperly expensed and on a portion of the reformation claim (R 467). Hanna on its cross-appeal challenges this, contending that the award of prejudgment interest is improper in this case.

As to the amounts at issue: The judgment below awarded the Government $473,304 ($231,506 on 38 items and $241,798 on reformation) plus certain prejudgment interest.[7] The Government contends that if it prevails on all issues in this Court, it should be awarded an additional $1,168,671 plus interest. If Hanna prevails on all issues in this Court, the award to the Government would be reduced to $231,506 with interest only from the date of judgment.

The issues which this Court is called upon to decide are whether, as the Government asserts on its appeal, the District court erred in holding that

(a) generally accepted accounting practice governs as to capitalizing or expensing the items in issue;

(b) the evidence showed that under such practice the items in issue were properly expensed;

(c) estoppel barred the Government's claim as to items expensed after 1957 (which question need not be decided if it is concluded that (a) and (b) were

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7. The amounts awarded by the District Court are itemized in Appendix B, p 96 below.

and whether, as Hanna asserts on its cross-appeal, the District Court erred in

(d) reforming the 1961 amendment to reflect an agreed formula rather than an agreed figure;

(d) allowing prejudgment interest.

SUMMARY OF ARGUMENT

1. The District Court's interpretation of the terms of the contract, ambiguous in their definition of the accounting standards to be applied under it, was based on extensive oral and written evidence. It was clearly correct and cannot be disturbed on appeal. The eminent accounting witnesses testifying in support of Hanna's position agreed that the contract did not provide a self-contained accounting system which required replacements and improvements to be capitalized, that accounting standards outside the terms of the contract had to be used in determining whether specific expenditures should be paid for with capital advances or working capital advances, and that the contract could only be administered according to generally accepted accounting practice. The Government's own expert witness had to rely on outside accounting standards

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8. The Government's third specification of error (Gov Br 29) -- the failure of the District Court to hold The Hanna Mining Company liable on a guarantee contract (DMP-51) -- does not require the Court's consideration; defendants have at all times recognized that Hanna Mining is guarantor of any liability of Hanna Nickel Smelting Company.

to support the Government's claim. The Government's view as to the "unambiguous" cost accounting system prescribed by the contract has undergone repeated changes, and as now stated the "syst has no relation to the contract terms and has become wholly unintelligible.

The District Court's interpretation of the contract is wholly consistent with the evidence of the contract negotiations and the practical construction given to the contract by the partie over a period of nearly eight years. Contrary to the Government's contention, the District Court's interpretation does not deprive the Government of any rights under the contract or conflict with any of its terms.

2. The District Court correctly found that the accounti practices applicable to the contract were those common to the smel industry. Accounting practice is only the application in specifi cases and under specific circumstances of the principles which un lie accounting theory. This was a smelting contract, and the gen accepted accounting practice applicable to it was necessarily pra applicable to that industry. The evidence was conclusive that un practices applicable to the smelting industry, the disputed items were properly charged to cost of production. The Government's co tradictory evidence on applicable accounting practices was abstra inconsistent and in large part unintelligible.

3. It is undisputed that the Government was fully informed of the accounting practice applied by Hanna under the cont by the end of 1957 and acquiesced therein until March, 1962 when it first disputed the company's accounting treatment of items

purchased in 1959 and 1960. Following 1957, Hanna relied on the Government's acquiescence in that practice, thereby increasing substantially its exposure in this action and incurring expenses which it could have and would have avoided if the Government had objected or otherwise made its position known prior to 1962. The District Court correctly concluded that the Government was estopped to asserts its claim for items now in issue which were paid for after January 1, 1958.

ARGUMENT

I.

The District Court correctly found that the contract did not contain a complete and unambiguous cost accounting system and that generally accepted accounting practice was to be applied in its performance.

The main issue on the Government's appeal is whether certain disputed expenditures were properly expensed and charged to cost of production, as Hanna contends and as the District Court held.

The crucial analysis and findings of the District Court on the question of the interpretation of the contract (R 383-384) are as follows:

> "The Government contends that the 216 disputed items are replacements and improvements of the smelter which are eligible for capital advance treatment under Article VI, paragraph 1(c). It also contends that such expenditures must be capitalized

and financed under that provision, since the definition of working capital and actual cost of production refer only to expenditures 'not covered by Capital Advances.'

"The contract does not define the terms 'replacement' and 'improvement.' The Government originally argued that all items which, descriptively, are replacements or improvements are included within the capital advance provision. The Government now concedes that this position is untenable and that the replacement of a light bulb, for example, is not a capital expenditure. At the beginning of the second trial, it conceded that 68 of the items originally contested were properly expensed as repair and maintenance costs.

"I find that the terms in Article VI, paragraph 1, are ambiguous, and that other provisions relied on by the Government do not resolve the ambiguity * * *.

"I find that the terms 'replacement' and 'improvement' as used in this contract are terms of accounting art. In determining how to account for a particular item, an accountant must look beyond the contract and rely on generally accepted accounting principles and practices."

The Government as appellant contends (Gov Br 38-39; see also 11-17, 31) that the contract, while complex, is not ambiguous (the trial court found it was); that the contract "established its own accounting system, under which expenditures for additions, modification, replacements and improvements to the smelting facility should be capitalized, and not treated as costs of production" (Gov Br 38); and that the District Court (and Hanna) erred in applying generally accepted accounting practice to determine what was to be expensed and what capitalized.

The "accounting system," which the Government purports to perceive in the contract, is found, says the Government, in Articles IV and VI (Gov Br 39-42). Article IV defined the facility which Hanna was to construct, equip, redesign, rebuild and repair

with "advances" made by the Government as provided in Article VI. Article VI stated the conditions under which each of the two types of "advances" would be made: "Capital Advances" would be made on request as required "(a) to test the process * * *, (b) to construct, equip, design and rebuild the Facility * * *, (c) for such replacements or improvements of the Facility which are agreed * * * to be necessary or advisable * * *, and (d) for such other necessary and so agreed upon expenditures which, in accordance with generally accepted accounting practice, are capitalized." "Working Capital Advances" would be made on request for "reasonable minimum working capital requirements" and could be used "to pay any costs and expenses hereunder * * * not covered by Capital Advances * * *." Capital advances and working capital advances were to be kept in separate bank accounts and not commingled.

The foregoing is the self-contained "accounting system" which the Government says required that all expenditures for "additions, modification, replacements and improvements to the smelting facility should be capitalized, and not treated as costs of production" (Gov Br 38).

But the contract says no such thing, and the record shows beyond any question that the contract did not contain an unambiguous accounting system as contended by the Government: (1) Four eminent accountants could perceive no cost accounting system in its terms and testified that generally accepted accounting practice had to be used under the contract; (2) the Government's accounting expert found it necessary to use accounting criteria external to the contract in order to support the Government's claim; (3) the

Government's own position as to the "clear" meaning of the contra has changed drastically and repeatedly over the years; (4) the Government's current version of the contract's self-contained accounting system bears no relation to the contract terms and is unintelligible.

The District Court's finding that the contract terms did n provide an unambiguous accounting system was clearly correct, and under Rule 52(a), Federal Rules of Civil Procedure it cannot be disturbed. Pacific Portland Cement Co. v. Food Mach. & Chem. Cor (CA 9 1949) 178 F2d 541 presented a closely similar question. That case concerned the proper interpretation of the phrase "cost of production" contained in the price escalation clause of an output contract for gypsum produced in an experimental plant. Th question was whether it contemplated price changes reflecting inc in indirect as well as direct costs of production. The District Court received evidence of the contract negotiations and expert accounting testimony. It found that the contract was ambiguous a on the record, interpreted it, as the seller contended, to includ increases in direct costs. On appeal, this Court defined the applicable standard of review of such findings:

> " * * * If, on the other hand, the language of the contract is not plain, two situations may present themselves: (1) the contract may contain technical or trade terms, as to which the testimony of those skilled in the art or experts in the field is admissible, or (2) the contract may contain ambiguities which need extrinsic facts to explain. Whichever of these situations confronts us, its solution, on appeal, brings up the same question -- is there evidence in the record from which different conclusions might have been reached? If so, it cannot be said that the conclusion reached by the trial court is clearly erroneous." (178 F2d at 549)

> " * * * we have an issue framed and decided by the trial court upon contradictory testimony, both lay and expert, with ample evidence in the record to support the view adopted by the trial court. * * *" (178 F2d at 553-554)

The court sustained the District Court's contract interpretation, which resolved a conflict in expert accounting testimony (at 553-554):

> " * * * we cannot say that the Court's finding is 'clearly erroneous',when the matter was one of choosing between two contending theories of accountancy." (178 F2d at 558)

Under Rule 52(a) of the Federal Rules of Civil Procedure findings of the District Court are conclusive on appeal unless clearly erroneous. The findings in the present case, quoted at pages 15-16 above, are not merely supported by substantial evidence; they state the clearly correct and only proper view of the situation under this contract -- as demonstrated below.

a. Hanna's expert accounting witnesses testified that the contract did not contain a cost accounting system and that generally accepted accounting practice had to be applied in its performance.

The witnesses in support of Hanna's position were Richard . Baker, managing partner of Ernst & Ernst, with 25 years of xperience with that firm (July Tr 155); Bruce Smith, a partner of rice, Waterhouse, with over 30 years of accounting practice (July Tr 98, 199; Def Ex 127); Maurice Peloubet, a partner in Price,

Waterhouse with 55 years of accounting practice (July Tr 216; Def Ex 128) and John Queenan, managing partner of Haskins & Sells, with 38 years of accounting experience (July Tr 229; Def Ex 129). These four eminent and experienced accountants could find no self contained cost accounting system in the contract.

Mr. Baker, whose firm, Ernst & Ernst, had performed periodic audits during performance of the contract, testified that his firm concluded that under the contract generally accepte accounting practice governed accounting decisions (July Tr 158), and that when they sought to interpret the contract for accountir purposes there was no doubt in their minds that generally accepte accounting practice should prevail (July Tr 161). The contract does not contain the detailed cost accounting criteria generally found in Government contracts, and "the only criterion that could be used from an accounting standpoint is generally accepted accou ing practice" (July Tr 193-194). Mr. Baker explained that an int pretation of the contract which would require capitalizing -- and capital advance treatment -- for literally all "replacements," such as light bulbs, made no sense and was obviously not intended (as the Government witness, Dr. Wright, conceded -- July Tr 49); hence, some interpretation of the contract was necessary to deter mine which replacements should be capitalized and which expensed, and the appropriate tool for interpretation was generally accepte accounting practice (July Tr 246-247). The other experts testifi to the same effect -- that generally accepted accounting practice had to be applied, because as accountants they could perceive no other cost criteria (July Tr: Smith 211, 279; Peloubet 221-222; Queenan 230-231).

b. The Government's expert accounting witness found it necessary to have recourse to accounting criteria outside the contract in order to support the Government's claim.

Initially in this litigation, the Government took the position that all items which were literally "replacements" or improvements" had to be capitalized. Then it retained Dr. Wright as an expert. He reviewed the Government's list of 284 items on which its initial claim in this suit was based, and concluded that a number of them were in fact properly costs of production and should not have been challenged by the Government. Accordingly, the Government at trial withdrew its claim as to 68 items ($346,222) - ten of which, incidentally, were each in excess of $10,000.[9] Why did Dr. Wright recommend this? In his words:

> " * * * I could not believe as an accountant that every single replacement of a minor working part should have been treated other than as a cost of production item. Therefore, for some of the items which GSA described as being replacements of existing assets or partial replacements of assets, I recommended the change in classification. * * *"
>
> (July Tr 49)

Incidentally, Dr. Wright himself used generally accepted accounting practices in his attempt to construct a meaningful contract accounting standard. He freely admitted that in preparing his classification of the disputed items (Pl Ex 90), generally accepted accounting practices had "significant impact" (July Tr ?).

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[9] See R 334, 378; July Tr 7, 37. The items were those in Pl Ex 90, Category 10. They included Item 114, which cost $28,676.78; Item 171, which cost $30,239.85; Item 172, which cost $40,874.00; and Item 263/274, which cost $21,615.40.

In short, the Government and its expert witness recog nized the impossibility of relying exclusively upon the literal language of "replacements or improvements" in Article VI(1) of the contract -- some external accounting criteria had to be applied.

c. The Government's view as to the "unambiguous" meaning of the contract has undergone several inconsistent chan

(1) On February 6, 1953, less than a month after execution of the contract, a Government letter to Hanna referre to "generally accepted accounting principles" as the applicable accounting standard under the contract (Pl Ex 95, p 2). On February 27, 1959, in a letter on behalf of the Government to Hanna (Def Ex 108), Mr. Louis Brooks, Deputy Director of the Office of the Comptroller, applied "generally accepted account- ing practice" to all capital advances under Article VI(1). On March 14, 1962 the Government made its initial claim with respe to certain items in issue in this action, asserting (Def Ex 125 as the sole basis for its claim that Hanna had departed from "generally accepted accounting principles." Then came the lawsi

(2) The Supplemental Pretrial Order contains the Gv ernment contentions as of June, 1965: Hanna was obliged to cap ize, among other things, "all replacements and improvements of h

acility" (R 303) and had improperly expensed 284 items "of a apital nature," which it should have capitalized "without con- ideration of generally accepted accounting practices" (R 302). t this point, the Government was relying upon both clauses (b) nd (c) of Article VI(1) (R 302, 303).

(3) At the trial, this position was abandoned. Dr. right, in support of the Government's claim, drew obscure distinc- ions between replacements which improve and replacements which o not (July Tr 48-51), and thereby abandoned the contract account- ng system for which the Government contended in the Pretrial rder. The Government also abandoned its claim as to Article VI(1) b), stating to the court that all of the 216 items which it by hen still disputed were "replacements or improvements" (July Tr -5) -- i.e., they were required to be capitalized under clause (c). he District Court's opinion so states the Government's contention R 383); and the Government's statement in its points on appeal sserts that the disputed items were "replacements or improve- nts" (R 495). Thus, at the trial the Government changed its osition to contend that all of the items in issue were replace- nts or improvements and simultaneously recognized that not all replacements or improvements were required to be capitalized.

(4) On appeal, the Government now says it is not only dealing with "replacements" and "improvements," but also "additions" and "modifications" (Gov Br 29). This change demon- strates the continuing flexibility of the Government's position in this case and underscores the fact that the "clear" meaning of

this contract to the Government varies from time to time.[10] Moreover, this latest change of position results in a purported "clear" meaning of the contract which is substantially more obscur than any of the succession of theories which have preceded it -- as the following section demonstrates.

d. The Government's most recent version of the contract bears no relation to its terms and is unintelligible.

It will be recalled that the Government bases its case on the proposition that the contract has a self-contained and clear set of cost accounting standards. Analysis demonstrates that neither is true. To this moment, the Government's position remains unclear as to what the contract's self-contained cost accounting system really is. In its Brief as Appellant it states first that this system requires that expenditures for "additions, modification, replacements and improvements to the smelting facility should be capitalized, and not treated as costs of production" (Gov Br 38). It says substantially the same elsewhere (Gov Br 12, 16, 30, 39).

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10. In addition, the Government's most recent change in position presents it with certain major difficulties: First, there are no categories of "additions" or "modifications" to be found in the contract. Second, this issue is not properly before the Court -- because the Government's statement of points on appeal presents only the issue of the propriety of expensing "replacements or improvements"; and because, if the Government sees clause (b) of Article VI(1) as the source of its new argument, that issue was abandoned at trial.

Apparently, however, the Government doesn't mean all such expenditures. For it elaborates (Gov Br 43) as follows:

> "* * * Under the accounting system contemplated by the contract, an expenditure for the replacement of a component -- rather than the entire unit -- of a specifically described item of equipment (or of an item not specifically described but agreed to by the Government) would not be covered by capital advances because it would not be an expenditure for the replacement of a specifically described item of equipment (or for the replacement of an item not specifically described but nevertheless agreed to by the Government as necessary or advisable). On the other hand, if the replacement of a component of an item effected an improvement in the item, it would be covered by capital advances under clause (c) because it would then be an expenditure for improvement of an item of equipment as specifically described or of an item added with the Government's agreement.* * *" (Emphasis in the original)[11]

This appears to mean that, in the Government's view, while the replacement or improvement of "a specifically described item of equipment" must be capitalized, the replacement of "a component -- rather than the entire unit -- of a specifically described item of equipment" must not, unless it "effected an improvement in the item," in which latter case it is to be capitalized. Perhaps consistent with this is Dr. Wright's testimony that not all "replacements" should be capitalized, but that each "replacement" which was not an improvement and which was used solely for the purpose of replacing a defective, worn out or damaged part should be expensed (July Tr 50).

This, says the Government, is the "accounting system

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11. To illustrate how much of a gloss this paragraph places on the contract, attention is called to the fact that the terms "component," "unit," "item," and "specifically described item" are not found in the contract.

established by the contract" (Gov Br 39). But the contract says such thing. Obviously, much has been imported -- from sources wh are obscure.

What is the source of the "item"/"component" dichotomy? How does one determine what is an "item" and what is a "component" (If a furnace is an "item," are all parts of the furnace "components"? Is a light bulb a "component" of the electrical system, so that an improved replacement bulb must be capitalized?) Why are "replacements" of "components" capitalized if they improve the "item," but expensed if they don't? (The contract in terms treats all replacements and improvements equally -- but the Government would read in a distinction between improving replacements and non improving replacements.)

Not only is this "self-contained accounting system" based on obscure sources, but even as now explained by the Government, it is wholly unclear. Purportedly, the Government's "syste is arrived at by looking at express provisions of the contract. One searches in vain for contract language which supports this strained, artificial and unintelligible construction of the contract, and the inference is inescapable that this is merely th last in a succession of contrived theories to support a preconceived result.

e. The Government's other arguments in support of its interpretation of the contract are without merit.

In addition to its contention that there was in the contract a self-contained cost accounting system, the Government says that generally accepted accounting practice should not be applied because of (a) the history of the contract negotiations (Gov Br 54-60), (b) the interpretation of the contract by the parties during performance (Gov Br 64-76), and (c) the effect of such interpretation of the contract on various Government "rights" (Gov Br 47-54, 61-64). The fact is that both the history of the negotiations and the parties' construction of the contract during its performance reinforce the conclusion that generally accepted accounting practice is applicable -- and this construction of the contract violates no "rights" of the Government whatsoever.

(1) The history of the contract negotiations supports the District Court's decision.

The Government contends (Gov Br 54-60) that the contract drafts evidence a deliberate decision that items such as those in question were to be capitalized without regard to generally accepted accounting practice. The drafts demonstrate no such thing. To the extent that they shed any light, they show an intention that generally accepted accounting practice was to be the

criterion for determining what should be capitalized and paid for under the capital advance provisions.

The only portions of the Government's discussion of the evidence of contract negotiations which appear to give any plausible support to its position depend wholly upon a distortion of the record, as the following demonstrates:

(a) The Government (Gov Br 56-57) quotes a draft which defined "cost of production" in terms of generally accepted accounting principles. It states that this was contained in Hanna draft of 11/24/52 (it was not; it was in a separate, partial draft dated 12/9/52 (see P1 Ex 140) and is not shown to have ever been exhibited to or considered by the Government). It then asserts that "The Government's negotiators objected to these provisions." -- as if the objection were to the definition of cost of productio in terms of generally accepted accounting principles (a disingenuous assertion, wholly unsupported; the language of the memorandu quoted immediately thereafter (Gov Br 57) makes it clear that the "objection" to the provision there under discussion was to the la of any provision for Government approval of capital expenditures, a wholly different question on which Hanna accepted the Government's position).

(b) Similarly, there is no support for the asserti (Gov Br 58) that "the Government rejected the language suggested by Hanna" limiting capital advances to expenditures capitalizable under generally accepted accounting practice. A fortiori there is no support for the Government's subsequent bland specula tion as to the reason for this nonexistent rejection, in the

ollowing language (Gov Br 59):

> "The record does not affirmatively indicate why the definition in Hanna's drafts which would have provided capital advance treatment only for those 'replacement/s/, additions, or improvements * * * which, in accordance with generally accepted accounting practice, are capitalized' was rejected. * * *" (Emphasis supplied)

xactly to the contrary, the record shows that it was not rejected, ut rather that it survived in the final contract, as appears from he following:

It is undisputed that in the early drafts of Article I(1) only replacements or improvements which were capitalzable in accordance with generally accepted accounting practice ere to be financed by capital advances. As further provisions ere inserted in Article VI in successive drafts, the words "replaceents" and "improvements" became physically somewhat separated rom the words "which, in accordance with generally accepted ccounting practice, are capitalized." But there is no evidence o show, as the Government contends, that the negotiations intenionally eliminated generally accepted accounting practice as the riterion for determining which replacements or improvements equired financing by capital advances; and the use of the words such other necessary and so agreed upon expenditures which, in ccordance with generally accepted practice, are capitalized" shows ust the reverse intention -- that this same standard was to continue t be applicable to "replacements" and "improvements" and also to pply to other expenditures. The intention to preserve that standard i demonstrated by the fact that immediately upon conclusion of te negotiations one of the Government's negotiators, Mr. Johnston Russell, reminded Hanna in writing that its accounting decisions

would be reviewed to assure compliance with "sound accounting practices and generally accepted accounting principles to the maximum extent possible" (Pl Ex 95, p 2).

A fuller summary of the negotiations and drafts is set forth in Appendix D hereto, pp 109-112 below.

In view of the total absence from the negotiation documents of proof supporting the Government's contention, thereby forcing the Government to rely only on inference (and unreasonable inference at that), it is appropriate to note that Col. Melville Robinson, the chief Government negotiator, was present in the courtroom during the trial and had been listed as a witness for the Government. However, he was not called to testify (July Tr 152, 292). It is reasonable to assume that if he could have testified that there was an intentional elimination of generally accepted accounting practice as the standard for determining which replacements or improvements would be the subject of capital advances, he would have been called by the Government to do so.

(2) <u>The practical construction of the contract by the parties supports the District Court's decision.</u>

(a) The record shows that throughout the life of the contract the Government insisted and Hanna agreed that generally

accepted accounting practice should be applied.[12]

This commenced during the negotiations and on January 16, 1953, when Government negotiators questioned the provision for capitalizing costs and expenses during Period 1 "down time," because, in their view, such costs should be expensed under normal accounting principles (Def Ex 83; Def Ex 122, p 3). It ended with the Government's initial demand for reimbursement on March 14, 1962, which was based solely on its

> " * * * view that, in accordance with generally accepted accounting principles, the cost of these items should have been capitalized and not expensed during the period in question, * * *" (Def Ex 125, p 1; see also P1 Ex 23, p 2)

Between 1953 and 1962, the Government's position was repeatedly and emphatically stated. On February 8, 1953 the Director for Financial Analysis of DMPA advised Hanna that:

> "In respect to the accounting methods which you will employ in connection with this contract, it is our policy to adhere to sound accounting practices and generally accepted accounting principles to the maximum extent possible." (P1 Ex 95, p 2)

In its instructions to its auditors, DMPA stated as the purpose of the examination

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2. The Government suggests that the various occasions on which Government officials contended that generally accepted accounting practices were controlling under the contract are "by no means inconsistent with the Government's position," because there is no difference between the contract standard and generally accepted accounting practice (Gov Br 76-77, fn 47). They are, of course, utterly inconsistent with the Government's contention that under "plain rules of English grammar" (Gov Br 59; see also 49), the contract language requires replacements and improvements to be capitalized without regard to generally accepted accounting practices.

> " * * * that the final figures shown therein be given adequate audit treatment to see whether such costs meet the requirements of generally accepted accounting principles (cost principles) and the peculiarities provided in Amendment No. 3, page 3, substituting paragraph 1 of Article VI of the original contract." (Def Ex 48, p 4; emphasis supplied)

On February 27, 1959 Mr. Louis Brooks, Deputy Director of the Office of the Comptroller, objected to the company's calculation of the 1959 amortization rate on the ground that

> " * * * it is our understanding of 'generally accepted accounting practice', as that term is used in Article VI-1, that costs are not capitalized until they have been incurred." (Def Ex 108)[13]

Finally, the Audit Division report by R. B. Brown dated February 7, 1962 questioned the expensing of certain disputed items because it was of the view that they should have been capitalized "in accordance with generally accepted accounting practice" (Def Ex 77, pp 2-3; see also Exh B thereto).

During the performance of the contract, Hanna and its accountants shared the Government's view of its proper constructic The Ernst & Ernst reports which were reviewed each year in the cou of the Government's annual audits utilized generally accepted accc ing practices (July Tr 158), including the company's practice disputed in this lawsuit of expensing replacements and improvements of items which did not work as originally planned. The company's practice was described in the notes of Mr. Richard Joliat, of Ernst & Ernst, which were reviewed by Government auditors during their annual audits (Oct Tr 235-260, 265-266). The trial judge

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13. Note that he discusses "generally accepted accounting practice" in terms applicable to all capital advances under Article VI, not merely advances under (d).

found (R 390), and it is not denied on appeal, that by the end of 1957 the Government knew all about the company's accounting practice. The evidence shows, in addition, that whenever it was to its advantage, the Government insisted that the use of generally accepted accounting practice was required by the contract.

(b) The Government (Gov Br 64-76) enumerates various instances which, it says, demonstrate that Hanna interpreted the contract as requiring capitalization of expenditures "virtually identical" to the ones now in issue (Gov Br 75) and thus acted inconsistently with "the theories advanced by Hanna in this litigation and held applicable by the district court" (Gov Br 65). The Government's references establish no such thing.

Several of the instance referred to by the Government (Gov Br 64-69) relate to expenditures for the construction of the facility. Mr. Spang's correspondence of April 7, 1953 (P1 Ex 42), February 28, 1955 (P1 Ex 44), March 8, 1955 (P1 Ex 45) and January 4, 1956 (P1 Ex 47) by their terms request approval of earlier expenditures for original plant construction. All of those expenses were capitalized in accordance with generally accepted accounting practice (Baker, July Tr 244-245). Similar considerations apply to the Government's reliance (Gov Br 68) upon Hanna's proposal in June, 1955 that working capital be authorized for capital expenditures to cover the estimated cost of items not included in the Bechtel estimates (Def Ex 105, pp 5-6). The Government has not shown that any of those items should have been expensed -- instead of capitalized -- under the accounting practices followed by the company and none of them is in issue in this action.

The Government also relies (Gov Br 70-76) on internal company correspondence relating to Hanna's request in 1957 for additional capital advances, which eventually led to Amendment 4 increasing the capital advance ceiling by $875,000. For example, in February, 1957 Hanna's plant manager included improved dutch ovens in his itemization of capital needs (Pl Exs 51, 52). This characterization of his requirements was not, of course, an accou decision -- which could be made only by the company's accountants Nor was it carried forward into any action of the company. None of the additional money was spent for such items.

It is significant that in none of the cited correspond- ence and memoranda is there any suggestion that the standard for determining what was to be capitalized and what charged to cost of production was anything other than generally accepted accounti practice -- the standard which, as above indicated, had been reit erated by both parties from the execution of the contract to the filing of the claim on which this litigation is based. The most that can be claimed for any of the materials relied on by the Government from pages 64 to 76 of its brief is that some of them indicated uncertainty or differences of opinion or inconsistency within the Hanna organization as to the application of the standa of generally accepted accounting practice.

Nor is this strange. The Government's accounting witne himself testified (July Tr 39-40) that accounting is not an exac science and that differences of opinion among equally qualified accountants would undoubtedly be encountered on the questions of judgment at issue here. The proposition that generally accepted

accounting practice was and must be the standard of reference is not in the least undermined, therefore, by a showing that consideration was given, for example, to requesting capital advances to extend the slag disposal facilities or to replace the dutch ovens, when, upon a final accounting determination, these items were expensed. And for the same reasons such preliminary differences of opinion are not in the least inconsistent with the trial court's finding, based upon the heavy prepondernace of accounting testimony, that such accounting was proper.

(3) The District Court's decision does not impair the Government's rights under the contract.

The Government contends (Gov Br 47-54) that the District Court's interpretation of the contract deletes some of its provisions and is incompatible with others and (Gov Br 61-64) that it deprives the Government of its "veto" over capital expenditures. Neither contention is valid.

(a) The Government's contention that under the District Court's interpretation of the contract replacements would "never" be capitalized but would "always" be expensed and that improved equipment will "rarely" increase the value or capability of the smelter as a whole (Gov Br 50-51) is not only speculative, but is also incorrect. As an example, most of the new dust collection system, which was a replacement and improvement of the original

equipment, was admittedly capitalized to the extent of almost $700,000 (P1 Ex 82, Item 49).

(b) The expenditure regarded by the Government as a "striking example" of the District Court's asserted error, namely expensing of the two dutch ovens acquired in 1957 (Gov Br 51, 15-16) is in fact an excellent illustration of the reasons why two factors so much emphasized by the Government -- the size of the particular expenditure and the estimated useful life of a piec of equipment considered in isolation -- are not controlling.[14] For, as pointed out by Bruce Smith (July Tr 208-209), these items substantially duplicated the previously existing ovens and were substantially similar units; the capital account should not contain two sets of dutch ovens when only one remained; the cost of either the old or the new (which were nearly the same) should be expensed; and in all the circumstances, what was done was proper.

(c) The contention that the Government was deprived its contract "veto" over capital advance items is based wholly on circular reasoning: Whether the disputed expenditures were subje to the Government's prior agreement depends upon their proper accounting treatment, i.e., whether they were to be paid for with capital advances or working capital advances. That is precisely the issue in this case. To contend that the Government was wrong fully deprived of its contract right to be consulted merely assum the answer to the question in dispute. The Government did not ha

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14. Consider P1 Ex 82, Item 114, costing $28,676, the useful li of which the Government estimated at 15 years (P1 Ex 166) a which the Government conceded was properly charged to expen

he right to be consulted about expenditures which were properly llocated to the cost of production, and the trial court correctly ound that the expenditures in question were properly so allocated.

The District Court's interpretation neither emasculates he contract nor deprives the Government of any rights.

II.

Under generally accepted accounting practice applicable to the contract, the disputed items were properly charged to cost of production.

a. The determination of applicable accounting practice s controlled by the fact that this was a smelting operation.

The District Court found that under generally accepted ccounting practice the 178 items challenged by the Government on his appeal were properly expensed and charged to cost of produc- ion. The Government contends, alternatively (Gov Br 77-81; see lso 17-18), that even if generally accepted accounting prac- tice is applicable under the contract, the District Court erred n applying accounting practice in the smelting industry and that he court should have applied generally accepted accounting practice n the abstract or else practice applicable in some other industry.

It is difficult to believe that this contention is s riously made. It flies in the face of common sense, and is olly inconsistent with all of the expert testimony. Dr. Wright t stified that

"Generally accepted accounting practices are the mechanisms by which a particular company achieves the objectives of generally accepted accounting principles in the measuring process." (July Tr 78)

Mr. Baker testified that generally accepted accounting practice

" * * * is the application of these broad general principles to a given situation * * *" (July Tr 159)

The trial court correctly stated (R 384):

"These experts all agreed that accountants rely on a relatively small number of accounting principles and that many accounting practices have been developed to apply basic principles to various accounting situations.

* * * * *

"In my opinion, the parties intended to apply accounting practices common to the smelting industry. I find that the company properly treated the smelter a a single capital unit." (R 387)

Despite the fact that this was a smelting operation, the Government would have the Court impose practices applicable to a manufacturing operation (Gov Br 50, 81, note 48) -- or else generally accepted accounting practice as a completely abstract concept (Gov Br 18, 24-25, 32, 34, 55 note 38, 60, 77 note 47, 79).

However, the record shows that the application of genea accepted accounting practice varies from industry to industry, and there are both differences and similarities between generall accepted accounting practices applicable to manufacturing compane and smelting companies (July Tr: Smith 201-204; Baker 159-160, 164). The evidence is uncontroverted that applicable accounting practice is determined from the contract terms and the nature of the industry and the operation conducted under it and all othr

ircumstances (July Tr: Baker 159).

It follows that accounting practice exists only in a specific factual context. "Generally accepted accounting practice" applicable to this contract consists of the accounting practices applicable to the specific operation conducted under it -- i.e., to the facts which the contract contemplates and which arose under it. The accounting practice contemplated by the parties is that which is accepted by accountants as applicable to those facts. The only "generally accepted accounting practice" relevant to this contract was that of the smelting industry.

b. The evidence showed that under applicable accounting practice, the District Court's decision was correct.

Hanna's expert accounting witnesses testified in clear and convincing terms about the accounting practices which are applicable to smelting operations, and their testimony fully supported the decision of the District Court. In determining whether to capitalize or expense an expenditure, the accepted practice in the smelting industry is to consider its effect on the entire smelter as a single unit and not its effect on any part considered separately from the whole. This fundamental concept was concisely stated by defendants' expert, Bruce Smith, in the following language:

> " * * * /W/hat might be a unit of equipment in a manufacturing operation is only a part in the smelting operation. That the smelter is in effect one facility and that that is the justification when we get to makin substitutions of what might appear from a textbook standpoint to be whole pieces of equipment, that so far as a smelter operation is concerned, they are merely parts in the one overall process." (July Tr 202-203)

This accounting practice is dictated by the nature of a smelting operation. Unlike many manufacturing operations, a smelter is designed for the production of a single product on an around-the-clock basis, and the units of equipment which make up the component parts of such a facility are functionally interdependent in much the same way as the component parts of an automobile engine are interdependent and designed for the performance of a single function (July Tr 164-165, 202-204). Because he was apparently unaware of these important characteristics of a smelte operation, Dr. Wright, in considering the effect of a given exper diture, focused his attention upon individual components of the facility rather than upon the facility as a whole. As a result, he reached different, and in this case, erroneous conclusions.

Hanna's expert witnesses testified that these accountir practices had been applied by them in reaching their conclusion that the disputed items were properly charged to cost of product (July Tr: Baker 163; Smith 200, 211; Peloubet 222; Queenan 230-3 The Government's contention that the evidence required a contrar opinion is wholly without substance.

c. The District Court correctly denied the Government's claim with respect to expenditures for removing and replacing equipment in the dust collection system.

Apart from its other propositions in this case, the Government contends (Gov Br 81-85; see also 22-23) that $114,234.82 of its claim for $198,746.62 for expenditures incurred in connection with installing the new dust collection system (Pl Ex 82, Item 49) should be allowed by this Court on the basis of a stipulation after trial that that amount was spent for "fabrication, equipment, erection and installation of new dust collection equipment" (R 336-337). The Government states erroneously that its claim was resisted in the District Court on the "sole" ground that the disputed amount "was spent solely to remove the old equipment," and that the stipulation disproves that defense (Gov Br 84).

The Government grossly misrepresents Hanna's defense and the District Court's decision. It is agreed that expenditures for new equipment were capitalized, and that the disputed expenditure "represents expenditures for removing old collectors and removing and replacing the auxiliary duct work" (Pl Ex 82, Item 49) (see also July Tr 182, 256-257). The existing duct work was worn out and poorly located; consequently, classifying this expenditure for replacement as well as removal of the duct work as a cost of production was proper under the company's accounting practice which was known to the Government and was sustained by the District Court (July Tr 257). Hanna did not claim and the District Court did not find that the amount charged to cost of production represented expenditures "solely" to remove the old equipment. Hanna did

claim that the money was spent, as the District Court found, "to remove and replace the original, inadequate equipment" (R 381), which was the stipulated fact (Pl Ex 82, Item 49).[15]

The only question before this Court is whether the expenditure was properly expensed, and the evidence fully supports the District Court's decision that it was. This expenditure was distinct for accounting purposes from the various parts of the new dust system which were capitalized (July Tr 182-183, 256-257), and the Government's claim, which is based upon a misstatement of Hanna's position and the decision of the District Court, is without merit.

III.

The District Court correctly concluded that the Government was estopped to assert a substantial part of its claim.

The District Court found:

> "As an alternative ground of decision, I find that, with two exceptions, the Government is estopped by acquiescence from asserting any claim for expenditures made after January 1, 1958. * * *
>
> * * * * *
>
> "I find that the Government knew of the accounting practices principally in dispute in 1957 but failed to protest at that time or at any time during the contract period. Its silence led the Company to continue using the practices and to increase its exposure in this action by almost $750,000.

15. The suggestion that the District Court acted inadvertently in failing to sustain the Government's claim is erroneous. The Government's present contention was fully developed during the trial upon the cross-examination of Mr. Baker (R 257-258). That evidence and the stipulation were both before the District Judge when he decided the case.

* * * * *

" * * * The Company asserts that it understood the Government's silence to indicate approval of the Company's accounting practices. Had the Government objected, the Company might have been able to resolve the dispute without increasing its exposure. I find that the Company relied to its detriment on the Government's silence.

* * * * *

"The evidence in this case shows that the Company consistently followed most of the accounting practices now in dispute and that Government agents, charged with the duty of investigating and reporting on the Company's accounting practices, were aware of the accounting decisions now in dispute by the end of 1957.

* * * * *

"I find that the Government, through its agent Pattarson, knew as much about the Company's accounting practices, with the exceptions already noted, by the end of 1957 as it knew in 1963. Particularly because the contract definition of capital expenditures was so ambiguous, the Government, in good conscience, should have informed the Company of its objections in 1957. I find that the Government was under a duty to speak in 1957."

(R 390, 391, 394-395)[16]

The Government concedes the correctness of the finding that its representatives knew about Hanna's accounting practices by the end of 1957 (Gov Br 87).[17] It does not assert, as it did below, that it could not be bound by the knowledge of these

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16. The Court excluded from the scope of the estoppel six major items and certain minor items costing less than $1,000 each. It found that expensing these items was not consistent with the accounting practices made known to the Government in 1956 and 1957 (R 390).

17. In its opinion, the District Court reviewed in detail the evidence which proved that the Government, through its responsible agents, knew of Hanna's accounting practice but failed to object to it, thereby permitting the company to increase its exposure in this action (R 390-394).

representatives. On appeal, the Government contends that its conduct amounted to laches, not estoppel, and that the sovereign is not barred by silence to assert "public rights" (Gov Br 89). It also contends that various of the elements of estoppel are not present.

a. In this case, the Government's rights and obligation are the same as those of a private suitor.

Unlike the cases cited by the Government, this is not a situation involving an exercise of the sovereign power of the United States;[18] it was a procurement contract between the Government and Hanna for the production and sale of nickel. As to this contract, the Government stands in the position of a private litigant and is subject to the same express and implied rights and obligations. In Krupp v. Federal Housing Administration, (CA 1 1961) 285 F2d 833 at 836 the court said:

> " * * * When the government goes into the market place it must go as everyone else. The public treasury may be protected by conditions imposed by Congress, or

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18. Utah Power & L. Co. v. United States, (1917) 243 US 389 concerned the right to occupy public forest land contrary to law, not the performance of a contract with a private party for the purchase and sale of personal property. Costello v. United States, (1961) 365 US 265 was a denaturalization proceeding. Finally, Federal Crop Ins. Corp. v. Merrill, (1947) 332 US 380 involved the liability of a federal corporation on an insurance policy issued without authority and in violation of applicable law. The Government does not assert on this appeal that Hanna's claim is based on unauthorized conduct of the Government's agents or that the transaction was in any respect illegal.

by lawful regulations, Federal Crop Ins. Corp. v. Merrill, * * *, but if the matter is left to contractual provisions and to the courts, all parties there must stand alike. We cannot recognize one rule for the government, and another for private litigants. * * *"

In United States v. Bostwick, (1877) 94 US (4 Otto) 53 at 66, the court said:

"The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them. * * *"[19]

This principle is not disputed; as the District Court properly concluded,

" * * * The Government admits that it can be estopped when one of its agents, acting within the scope of his authority, makes a representation on which another relies to his detriment."
(R 390)

b. The failure of the Government to object to Hanna's accounting decision estopped it to assert its claim in this action.

The silence of Government agents in failing to make

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19. See also Clearfield Trust Co. v. United States, (1943) 318 US 363 at 369; Perry v. United States, (1935) 294 US 330 at 352; Lynch v. United States, (1934) 292 US 571 at 579; Giustina v. United States, (DC Or 1960) 190 F Supp 303 at 308, aff'd (CA 9 1963) 313 F2d 710. Estoppel is within the obligations thereby assumed by the Government: Dayton Airplane Co. v. United States, (CCA 6 1927) 21 F2d 673 at 674; Branch Banking & Trust Co. v. United States, (Ct Cl 1951) 98 F Supp 757 at 766, cert den (1951) 342 US 893. Additional authorities are collected in United States v. Certain Parcels of Land, (DC SD Cal 1955) 131 F Supp 65 at 71-76.

any objection to the performance of supply or procurement contracts has repeatedly been held to estop the Government to assert claims for breach of contract or to establish binding waviers of their terms, particularly where, as here, the Government's rights are proprietary, not sovereign. In Roberts v. United States, Great American Insurance Co., (Ct Cl 1966) 357 F2d 938 at 946-947 the court said:

> " * * * By the Government's acquiescence and silence, plaintiff was led to believe that no claim would be asserted for the savings. Under these circumstances we hold that the failure of the contracting officer to make an equitable adjustment, within a reasonable time after it was apparent that savings had been realized and in time for the contractor to appeal any dispute on the matter to the head of the department, constituted a waiver by the Government of any entitlement to the claimed savings. As this court stated in Branch Banking and Trust Company v. United States, 98 F. Supp. 757 * * * (1951), cert. denied 342 U.S. 893 * * *, when the Government is acting in its proprietary capacity, it may be estopped by an act of waiver in the same manner as a private contractor. Such a result is justified by the plain language of the contract and accords with the principles of fair dealing."

In Maizel Laboratories, Inc., 1963 BCA ¶ 3898, the Board held:

> " * * * when the Government with full knowledge of a contractor's quality control procedure permits the contractor to perform the contract in accordance with such procedure, either as constituting compliance with the quality control requirements of the contract or an authorized deviation from such requirements, this results in a waiver of any objections the Government might otherwise have raised to the contractor's quality control procedure with respect to the contractor's performance up to the time the Government put the contractor on notice that its procedure is unsatisfactory to the Government where, as here, retroactive compliance is impossible."
>
> (at 19,351; emphasis added)

In McQuagge v. United States, (DC WD La 1961) 197 F Supp 460 the Government was held to be estopped by its silent acquiescence to assert a counterclaim for breach of contract when its authorized representatives knew the facts and the contractor relied to his detriment on its failure to object. The court said:

> "The government's argument that waiver and estoppel cannot be invoked against the sovereign must be qualified in light of the foregoing authorities. * * *
>
> "Here, as shown, acting through its authorized officers and agents, the government acquiesced in the performance of the contract by McQuagge without questioning the alleged failure of the concrete to measure up to specifications according to, significantly, the government's own tests, the authenticity of which is open to serious doubt."
>
> (197 F Supp at 471)

In United States v. Certain Parcels of Land, supra, (DC SD Cal 1955) 131 F Supp 65 the District Court held that the Government was estopped by implied acquiescence from asserting a claim to title to certain improvements on property located at Los Angeles Harbor which was being condemned. After reviewing the equitable principles on which estoppel rests, the court said:

> "The Government's implied acquiescence through delay is shown by its failure to take any action to protect the property right which it now asserts in the improvements, though its agents concerned in the matter knew of Outer Harbor's actions in refurbishing the warehouses and in finding a tenant for them. * * *"
>
> (131 F Supp at 75)

See also David J. Joseph Co. v. United States, (Ct Cl 1949) 82 F Supp 345 at 351-352.

c. All of the elements of estoppel were shown in the record.

The Government does not deny (Gov Br 87) that its responsible agents knew all about the accounting practices employed by Hanna. This knowledge must, in any case, be assumed in light of the authority and obligation of the auditors to report their findings to higher authorities. Carrier Corporation v. United States, (Ct Cl 1964) 328 F2d 328 at 336-337.[20] Nor does it deny that it is bound by the knowledge of its agents acquired in the performance of their duties[21] or that they were authorized and obligated to communicate their findings to their superiors. It places principal reliance on the assertion that Hanna did not rely to its detriment upon the implicit representation of the Government that the accounting practices employed by it were consistent with the contract.

That the other "elements" of estoppel briefly charged to be missing (Gov Br 92) are present in the record is established

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20. See also Bowen v. Mount Vernon Sav. Bank, (CA DC 1939) 105 F2d 796.

21. In this regard, see United States v. Shelby Iron Co., (CCA 5 1925) 4 F2d 829 at 833, rev'd on other grounds (1927) 273 US 571:

> " * * * The government is as much bound by notice to of its agents as is an individual or private concern. * * *"

The Supreme Court approved the decision of the lower courts if, upon a retrial, there should be proof of actual notice of the company's claim (273 US at 581-582). See, generally, Restatement of Agency 2d, § 272; Prudential Ins. Co. v. Saxe, (CA DC 1943) 134 F2d 16 at 30-31, cert den (1943) 319 US 745.

from an examination of the "definition" relied on by the Government. 3 Pomeroy's Equity Jurisprudence (5th Ed) 189, 191-192. Professor Pomeroy's discussion of the elements of estoppel absolutely disproves the Government's contention which purports to be based upon it. Thus, it has been shown, pp 45-47 above, that "silence -- amounting to a representation * * * of material facts" is sufficient and that an objection to the sufficiency of contract performance is a material fact which can be lost by failure to assert it. Secondly, it is sufficient that the circumstances of this case made reliance "natural or probable" -- there need not be any "expectation" of reliance.[22] Knowledge which is "imputed," as well as actual knowledge, is sufficient, and the trial court's finding that Government agents knew all about Hanna's accounting practices is so thoroughly supported in the record that the Government elsewhere in its brief expressly disclaims any attack upon it (Gov Br 87).

The objection that Hanna did not "change its position" in reliance upon the Government's silence (Gov Br 92) is also without merit. Hanna's detrimental reliance on the Government's silence was clearly established in the record and was sufficient to estop the Government.

In Mahoning Inv. Co. v. United States, supra, (Ct Cl 1933) 3 F Supp 622, cert den (1934) 291 US 675 the court pointed out that when an estoppel is based upon acquiescence, the party asserting the estoppel usually has not acted affirmatively to change his

22. Mahoning Inv. Co. v. United States, (Ct Cl 1933) 3 F Supp 622 at 630, cert den (1934) 291 US 675; First Federal Trust Co. v. First Nat. Bank, (CCA 9 1924) 297 Fed 353 at 356.

course of conduct, but rather, as in Hanna's case, has been misled into continuing in a course of conduct already begun (3 F Supp at 630). It is sufficient if the party has been induced to refrain from using such means or taking such action as lay in his power by which he might have retrieved his position and saved himself from loss. See, e.g., DeBobula v. Manhattan Storage & Transfer Co., (CA DC 1952) 194 F2d 885 at 886; Leather Manuf'rs Nat. Bank v. Morgan, (1886) 117 US 96.

Such reliance was shown without contradiction in the record.

(1) Mr. Spang testified that in 1956 and 1957 Hanna a the Government carried on constant discussions regarding Hanna's op ting experience and need for additional capital funds and an increase in the ceiling on production costs, so that Hanna could make a favorable determination of feasibility (Oct Tr 27-28). Amendment 4 to the contract, made as of September 30, 1957, increased the capital advances and the ceiling price, and on the strength of this Hanna determined feasibility (Oct Tr 29). Mr. Spang, who was personally involved in the amendment negotiations (Oct Tr 27), was aware of the fact that in the closing conferences with Hanna personnel Pattarson had raised no material matters (Oct Tr 31). The agreement in Amendment 4 increasing the capital advances by $875,000 and the ceiling price to 75¢ was based on Hanna's past accounting practices, projected into the future (Oct Tr 32).

Mr. Spang further testified that if in the period from June to September, 1956 the Government had raised the question

which it eventually raised in 1961, Hanna would have had various options: The obvious first course would have been to sit down with Pattarson and his superiors and try to resolve the accounting dispute which the Government has now raised (Oct Tr 31), and to resolve it in accordance with the view of Ernst & Ernst, then and now, as to what constituted sound accounting practice; if the Government had persisted in its view that the company's accounting treatment was incorrect, Hanna would have insisted on more capital money (Oct Tr 31-32); otherwise Hanna would have had to make a determination of nonfeasibility (Oct Tr 32) with the result that there would have been no loss to Hanna (Oct Tr 32-33; and see Pl Ex 1 (Art XIV (1)). The adverse consequences to the Government of a negative determination of feasibility were tremendous, for the result would have been -- in addition to a wasted expenditure of more than $22,000,000 -- the assumption of substantial liabilities (Oct Tr 32-33; and see Article XIV(1)), without developing additional supplies of scarce nickel.

In 1958, neither Mr. Pattarson nor the GAO auditors raised any questions as to the propriety of Hanna's accounting (Oct Tr 35-36, 257-259). If questions had then been raised, the same options would have been available to Hanna as in 1957, except that it could not have made a negative determination of feasibility, but would have refrained from making expenditures, except perhaps within the $875,000 of capital advances available after September, 1957 (Oct Tr 36-38).

(2) Secondly, there was over $600,000 of authorized capital advances under the 1957 amendment which was never used

and which became unavailable to Hanna in 1960, when total deliveries exceeded 95,000,000 pounds. If the Government's objection to Hanna's accounting practices had been asserted when the Government became aware of them in 1957, the money could have been used and amortized over the balance of the 95,000,000 pounds of nickel which was delivered by October 1, 1960.[23]

It is, consequently, immaterial that Hanna adopted its accounting practices before the Government's silence became relevant (Gov Br 92-93). The entire basis of the estoppel applied against the Government was that Hanna had not only done so, but told the Government that it had done so. The estoppel was only applied from the time that this knowledge was received and the Government came under a duty to speak.

The appeal from the decision of the District Court that the Government was estopped to assert a substantial part of its claim is without merit.

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23. The Government contended in the court below (R 227, 228, 303-304) that this money was not available for these expenditures without Government approval. However, the record shows that (1) the Government never disputed Hanna's judgment that specific items were necessary or advisable (Oct Tr 37; July Tr 138-139, 142-143) -- indeed, under the contract it could not unreasonably withhold its agreement; (2) part of the increased capital was spent -- with its agreement -- for items not previously requested (Pl Ex 133, 135); (3) Hanna refused to release the balance of the excess funds because the amendment had been negotiated "to provide for contingencies not seen now" (Def Ex 126); and (4) these expenditures either reduced costs or were absolutely necessary to the operation of the smelter (Oct Tr 46-47, 58). Consequently, there is no question that the money would have been available for disputed items in 1958 and 1959.

CONCLUSION

The Government's appeal is without merit. The District Court's interpretation of the contract was correct. The contract had no self-contained accounting system, and generally accepted accounting practice had to be applied under it; the Government's alternative interpretation, which was developed and changed during the litigation, is inconsistent with the construction applied by the parties during performance of the contract and remains wholly unclear.

The evidence clearly establishes that under generally accepted accounting practice, taking into account the nature of the smelting operation conducted under the contract, Hanna's accounting treatment of the items at issue was correct.

Separately, the Government is estopped to challenge items expensed after 1957 by reason of its full knowledge of Hanna's accounting practice, its complete acquiescence therein, and Hanna's reliance thereon.

The judgment of the District Court, insofar as it has been appealed from by the Government, should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of the foregoing brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

_____

Attorney

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 21,232

HANNA NICKEL SMELTING COMPANY, a corporation, and THE HANNA MINING COMPANY, a corporation,

Cross-Appellants,

vs.

UNITED STATES OF AMERICA,

Cross-Appellee.

On Appeal from the United States District Court for the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

BRIEF ON CROSS APPEAL

STATEMENT OF JURISDICTION

Cross-appellants[1] adopt the Government's statement of the jurisdiction of the District Court and of this Court (Gov Br 1-2).

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1. Cross-appellants will be referred to hereafter as "Hanna" and cross-appellee as "the Government."

STATEMENT OF THE CASE

Hanna adopts the statement of the case in its answering brief (p 1 above) as supplemented below.

The District Court reallocated 38 items from production costs to capital expenditures and gave the Government judgment for their cost, in the amount of $231,506 (R 465-466, 468).[2] Hanna remains convinced that its accounting decisions with respect to these items were correct and that none of the items should have been reallocated. However, this Court has only limited power to review decisions of fact made below, and Hanna has concluded upon a thorough review of the record that, although the weight of the evidence might be considered to be otherwise, there is sufficient evidence to sustain the District Court's decision on this fact question.

On the cross appeal, therefore, Hanna makes only two contentions: that the District Court erred in (a) reforming the agreed ceiling price applicable to nickel delivered under Amendmer

---

2. Since production costs were included in the price paid by the Government (Art VIII), the court concluded that the Government had made overpayments for nickel in the amount of those items. Thirty-two items totaling $16,396.38 were "minor items" of less than $1,000 each. The remaining six, which totaled $215,110, were more costly items acquired late in the contract (R 388, 465-466).

5 and to Hanna's payment under the termination agreement of March 5, 1964; and (b) awarding the Government prejudgment interest on amounts found to have been overpaid for nickel. These rulings account for $329,126.89 of the final judgment of $560,632.89 (R 468-469; see Appendix B, p 96 below).

a. Reformation of the agreed ceiling price in Amendment 5 to DMP-50.

The District Court found that the agreed ceiling price of 58.77¢ per pound for nickel delivered after March 31, 1961, as contained in Amendment 5, "was computed by an agreed formula which was based upon the difference between the Company's costs of production in 1959 and 1960" (R 395). The court therefore reformed the ceiling price from 58.77¢ (the agreed figure) to 57.53¢ (a figure computed on the basis of the asserted formula in accordance with the court's determination that certain 1959 and 1960 items should be reallocated) and gave the Government judgment for $27,111.49 for nickel delivered after March 31, 1961 and $214,686.83 under the adjustment provisions of the March 5, 1964 termination agreement (R 466-467, 468-469).

Hanna contends that the District Court's finding that the agreed ceiling price of 58.77¢ under Amendment 5 was the result of an agreed formula, rather than being an agreed figure, was clearly erroneous and that the court erred as a matter of law in reforming the agreed ceiling price.

b. The award of prejudgment interest.

The District Court allowed prejudgment interest on the award for the 38 reallocated items, calculated "from the dates of overpayment," in the amount of $79,603.87, and it allowed prejudgment interest in the amount of $7,724.70, also calculated from the dates of overpayment, on the award of $27,111.49 for nickel delivered after March 31, 1961 under Amendment 5 to DMP-5 which latter award resulted from its conclusion that the ceiling price in Amendment 5 should be reformed (R 467, 468-469).

The District Court's allowance of prejudgment interest in a total amount of $87,328.57, was made without finding that Hanna acted wilfully, dishonestly or with guilty knowledge, and in the face of Hanna's contention and proof that the reallocated items, as well as all of the others, had been properly classifie as costs of production under generally accepted accounting practice.[3] The court's allowance of interest was also made in the face of its own finding that

> "There is no evidence that the Company acted wrongfully or failed to make its accounting decisions and practices known to the Government."
> (R 395)

Hanna contends that the District Court abused a limited discretion in allowing prejudgment interest from the dates of overpayment and, alternatively, that the court erred as a matter of law in awarding interest for any period prior to the Government's demands for reimbursement.

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3. July Tr: Baker, 162-163, 167-168, 169-170, 172-176, 177-17, 185-188, 259-266; Smith, 200, 206-207, 213, 276-278; Peloubet 221-223, 284-286; Queenan, 230-231.

SPECIFICATIONS OF ERROR

1. The District Court erred in finding that the agreed ceiling price of 58.77¢ per pound was computed by an agreed formula which was based upon the difference between the company's costs of production in 1959 and 1960 (R 395). Said finding is unsupported by any evidence in the record and is clearly erroneous.

2. The District Court erred in concluding that the agreed ceiling price for nickel under Amendment 5 to DMP-50 should be reformed from 58.77¢ per pound to 57.53¢ per pound (R 395-396, 466-467). Said conclusion is unsupported by any evidence and is contrary to law.

3. The District Court erred in reforming said agreed ceiling price and entering judgment applying the same, as reformed, to payments for deliveries under Amendment 5 and to the termination payment under the agreement of March 5, 1964 (R 466-467, 468-469). Sai conclusion is unsupported by any evidence and is contrary to law.

4. The District Court abused its discretion and erred in awarding the Government prejudgment interest on overpayments which it held the Government had made for nickel under DMP-50 and Amendment 5 (R 467, 468-469).

5. The District Court abused its discretion and erred in awarding the Government prejudgment interest for any period prior to the Government's demands for reimbursement (R 467, 468-469).

SUMMARY OF ARGUMENT

1. The District Court erred as a matter of law in ref ing the agreed ceiling price under Amendment 5 on the theory tha it had been computed by the parties according to an agreed "formula" based on the difference between the company's 1959 and 1960 production costs. The parties' only agreement was that the Government should pay Hanna's actual cost of production, but not more than 58.77¢ per pound. There was no evidence that they would have agreed to whatever price the "formula" might produce following an audit, or that they made any agreement not containe in Amendment 5 to which it could be conformed. The evidence showed, at most, an erroneous collateral assumption. Reforming the agreed ceiling price was not only legally wrong, but was harsh and inequitable.

2. The District Court erred in awarding prejudgment interest. The Government's claim was unliquidated and was gross excessive in amount. It was abandoned in substantial part at th commencement of the July trial. Awarding prejudgment interest will unfairly compound the substantial benefit which the reclas ified expenditures have already conferred on the Government.

3. In the absence of wrongful or fraudulent conduct, there was no duty, prior to a demand, to repay money which had e erroneously received under the contract. If any award of prejug interest was proper in this case, it could not extend beyond th date of the Government's demands for reimbursement. The judgmet for interest, if not improper in its entirety, was excessive as a matter of law in computing interest from the dates of the over- payments which the court found had been made for nickel.

ARGUMENT

I.

The District Court erred in reforming the agreed ceiling price under the 1961 agreement.

a. The Record

Amendment 5 to DMP-50 dated April 20, 1961 (effective as of March 31, 1961) provided that 19,499,863 pounds of nickel which remained to be delivered to the Government under the contract would be delivered by June 30, 1965 and paid for at a price equal to Hanna's average actual production cost of nickel delivered during each calendar year, but not more than 58.77¢ per pound. Hanna's average actual cost of production during 1961, the only year in which deliveries were made under Amendment 5, was 61.95¢ per pound (Def Ex 123; R 33). The lower agreed ceiling price therefore became the actual price of the nickel.

The Government's theory in support of its demand that the agreed ceiling price be reformed downward was set forth in the Supplemental Pretrial Order as follows:

> "The ceiling price of 58.77 cents per pound, effective as of March 31, 1961, was computed and agreed upon by deducting, from the average cost of production per pound during 1960, the reduction in average cost of production per pound between 1959 and 1960. In applying this formula, the parties assumed that the average cost of production per pound for 1959 and 1960 reported to plaintiff by Hanna were correct; but, as set forth herein, Hanna overstated its cost of production for 1959 and 1960. Computations of the correct ceiling price per pound for deliveries after March 31, 1961, on the basis of the corrected average costs of production per pound during 1959 and 1960, results in a ceiling price of 57.70 cents per pound applicable to the aforementioned past deliveries of 2,186,409 pounds of nickel and applicable to the aforementioned undelivered balance of 17,313,454 pounds of nickel.

"The contract should be reformed to reflect the true intent of the parties which was to establish a ceiling price of 57.70 cents per pound for said 2,186,409 pounds of nickel and for said 17,313,454 pounds of nickel."

(R 305)

The background of Amendment 5

Under the terms of DMP-50, Hanna was required to operate the Riddle smelter at maximum production and to deliver all nickel produced at the smelter to the Government (Article V). The contract was to terminate on June 30, 1962 or when 125,000,000 pounds of nickel had been delivered, whichever first occurred, whereupon Hanna had the right either to convey the smelter to the Government or to retain it and pay the Government the amount of all outstanding advances plus interest and a specified residual payment. Hanna also had the right to terminate the contract at any earlier time and retain the smelter upon making the same payments to the Government (Article XIV).

By the end of March, 1961, 105,500,137 pounds of contained nickel produced at the smelter had been delivered to the Government, and 19,499,863 pounds (less than one year's production capacity) remained to be produced and delivered to the Government under the contract prior to its termination on June 30, 1962 (R 298-299; Pl Ex 136, 1-D, p 1).[4] Amortization payments for capital expenditures included in the price of nickel under Article VIII had ceased in September, 1960, when delivery of the first 95,000,000 pounds was completed. The total price

4. Pl Ex 136 is the deposition of Mr. James V. O'Dwyer and attached exhibits. Those material to this issue are numbered 1-D through 6-D.

of the balance of the nickel was its cost of production, up to a ceiling of 75¢ per pound, plus any applicable escalation (Article VIII).

Under the terms of its contract with Bonneville Power Administration, Hanna had to decide by March 31, 1961 whether it would obligate itself to buy power for the smelter for the next 12 years (with a minimum obligation in excess of $1,000,000 annually) or cut off the power arrangement when DMP-50 ended on June 30, 1962. In effect, this required Hanna to decide by March, 1961 whether it would turn the smelter over to the Government or make the residual and other payments and retain and operate it for commercial production (Def Ex 98, p 2; Pl Ex 136, 3-D, p 1). While hopes were high for an eventual commercial market for ferronickel, the high fixed costs of the smelter (principally power) required that it be operated at or near capacity in order to provide a profitable operation, and the lack of an established domestic market caused Hanna to be reluctant to commit itself to the long-term power obligation (Def Ex 98, p 2; Pl Ex 136, 1-D, p 1; 3-D, pp 1, 2).

The Government wanted Hanna to exercise its option; it had no desire to take over the smelter and no need for further nickel (Def Exs 82, p 7, 98, pp 1, 2). It did, however, have a reason for retaining its right to receive the remaining 19,499,863 pounds. The market price of nickel (at which the Government might expect to resell it) was substantially higher than the cost of production which fixed the effective price to the Government under the contract (Def Ex 98, p 2; see Pl Ex

136, p 12).[5] Thus, it was mutually advantageous for the parties to enter into Amendment 5 on April 20, 1961.

The negotiations for Amendment 5

Mr. James V. O'Dwyer, the principal Government representative in the negotiations, testified on deposition that Hanna's initial proposal of February 1, 1961 (Ex 1-D to Pl Ex 136) to terminate the contracts and extend the period for delivery of the rest of the nickel from June 30, 1962 to June 30, 1965 was unsatisfactory to GSA. However, GSA suggested further negotiations (Pl Ex 136, 2-D).

On February 27, 1961 representatives of the parties conferred. The company was willing to guarantee the Government that its cost of nickel would not be increased as a result of operations during an extended delivery period, but the Government insisted on "a valuable consideration for increasing Hanna's room for movement under the contract" and suggested a reduced price. Hanna rejected this proposal, but the Government was assured that Hanna would take over and operate the smelter if an extension of time for deliveries could be negotiated (Pl Ex 136, 3-D).

On March 2, Hanna made another proposal:

> "2. In order to provide for the continued operation of the plant while attempting to develop commercial sales to replace the Government's purchase obligations, the Government will agree to purchase during the period ending June 30, 1965, an amount of ferronickel equal to that remaining to be delivered

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5. Under Amendment 4, the cost of production ceiling price had been increased to 75¢ per pound (Pl Ex 16). Actual production costs were running substantially less than that and therefore constituted the effective price to the Government (see Pl Ex 2, 93).

under Contract DMP-50. The amount and time of deliveries would be in our discretion in order to fit into plant operations and deliveries to industry. The Government will thus be assured of receiving the remaining contract amount by June 30, 1965. The price for the ferronickel will be the lower of (i) 60 cents per pound (1960 production cost[6]) of contained nickel or (ii) our actual cost of production.

* * * * *

"We should like to point out that, in addition to being relieved of the obligation to furnish working capital for the balance of the contract as well as immediately receiving the Residual Payment of $1,750,000, the Government will be quaranteeing [sic] itself against any increases in cost of nickel for the remainder of the contract. The year 1960 was the best year thus far at the Riddle operation. We produced more pounds of ferronickel in 1960 than in any other year and at a lower cost than any other year. In August 1960, there were automatic increases in the base labor rates under terms of the contract with the CIO as well as a cost-of-living adjustment plus additional costs incurred through the adoption of pension plans for members of the bargaining unit. On August 1, 1961, there is another automatic wage increase scheduled plus a possible cost-of-living increase. Under the proposed arrangement all of these items would be absorbed by Hanna Nickel Smelting Company."

(P1 Ex 136, 4-D)

Mr. O'Dwyer opposed this proposal, because it did not give the Government the benefit of the company's declining costs:

"A Well, in the light of the descending curve and operation costs over the prior years, particularly as between 1960 and 1959, it was, I thought, that should operations under the contract continue normally and the material being produced at capacity in twelve to fifteen months, we could certainly expect to have the benefit of a lower - - - a price lower than 60 cents.

"Q What figure did you have in mind?

---

6. Hanna had advised the Government in its initial proposal of February 1, 1961 that 60 cents was its "approximate" 1960 production cost (P1 Ex 136, 1-D, p 2).

"A Well, we decided the best way to approach it was to take the actual difference between the 1959-60 costs and deduct that as represented by cost per pound of nickel from the 60 cents figure, after certain adjustments were made, with respect to non-recurring costs such as the paving for the stockpile area."

(Pl Ex 136, p 15)

"We had been talking back and forth with Hanna for quite some time on the figure that had no particular basis in reason and it was my conclusion that if we could point up a reasonable approach to the thing by taking the actual difference of costs showing that as time went on the company became more and more competent in reducing costs that we could convince the company of the fairness of our position and they might find it difficult to refuse."

(Pl Ex 136, p 18)

The result of this view was the Government's proposal of March 9, 1961:

"Briefly, you propose, in effect, that deliveries under the contract be extended to June 30, 1965 and that the price to the Government be the lower of (a) 60¢ per pound of contained nickel, the 1960 production cost, or (b) the actual cost of production. In consideration of this deferral you will make the residual value payment and reimburse the Government for all working capital advances.

"We are agreeable in principle to the development of a mutually satisfactory arrangement under which the aims expressed in your communication will be accomplished. It is essential, however, that the Government satisfy itself insofar as it is possible to do so that it will not pay any more for the ferronickel to be delivered over the period of 4½ years than it would pay were the material to be delivered over the course of the next year to 15 months as provided in our Contract DMP-50.[7] To this end we call your attention to the inclusion of non-recurring charges in 1959 and 1960 and to a net reduction in production costs for the calendar year 1960 as compared with that of 1959 of 1.2¢ per pound, calculated as follows:

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7. In fact, these costs proved to be 61.95¢ operating at capacity (R 333; Def Ex 123).

	Cost Per Lb.
Average for calendar year 1959	$ .6130
Less: Storage Cost 1959 $26,292.64	.0013
Adjusted Average for 1959	$ .6117
Average for calendar year 1960	$ .6001
Less: Storage Cost 1960	.0004
Adjusted Average for 1960	$ .5997
Reduction in cost from 1959 to 1960	$ .0120
Adjusted average for calendar year 1960	$ .5997
Less Reduction in cost from 1959 to 1960	.0120
Projected Costs for Balance of Contract	$ .5877

"We think it is reasonable to project a production cost for 1961 at $.5877 per pound, and that this is a necessary precaution on the part of the Government since it has been indicated to us that during the next 12 to 15 months you may not find it practicable to operate at capacity.

"Subject to a satisfactory adjustment of all the other conditions of your proposal, with respect to which we think there will be no problem, we are willing to execute such amendatory agreements as are necessary to consummate the transaction on the basis of $.5877 per pound or your actual average cost of production during the year in which the ferronickel is delivered to the Government, whichever is lower. This contemplates that the proposed agreements will be effective as of March 31, 1961."

(Pl Ex 136, 5-D; emphasis supplied)

Mr. O'Dwyer testified that in making this proposal he intended "the basis for the computation" to be accepted as well as the price itself (Pl Ex 136, p 18). However, the letter makes no mention of Mr. O'Dwyer's asserted intent; there is no evidence that Hanna was advised of his intent, or that it was ever discussed between the parties. Nor is there any evidence that if Mr. O'Dwyer's "basis" had produced an offer by the Government of 57.53¢ per pound (the price imposed on the parties by the District Court), Hanna would have accepted it.

On March 14, 1961 Hanna replied as follows:

> "This is to advise you that Hanna Nickel Smelting Company accepts the proposal set forth in your letter of March 9 in regard to terminating Contracts DMP-49, DMP-50 and DMP-51, and substituting therefor provisions to extend to June 30, 1965 the balance of deliveries under present Contract DMP-50 at a price of $.5877 per pound of contained nickel or our average cost of production per year, whichever is lower. Your proposal contemplates that these arrangements will be effective as of the end of this month.
>
> "I assume that you will arrange to have prepared and furnished to us drafts of the appropriate agreements to carry out these understandings."
>
> (Pl Ex 136, 6-D; emphasis supplied)[8]

Amendment No. 5 provides:

> " * * * The 19,499,863 pounds of contained nickel shall be produced by the Contractor after March 31, 1961 and shall be delivered to the Government at such time or times after March 31, 1961 and prior to June 30, 1965 as the Contractor in its sole discretion shall determine, at a price per pound of contained nickel which shall be equal to (a) the Contractor's average actual cost of production per pound of contained nickel in the calendar year in which such ferro nickel is delivered to the Government or (b) $0.5877, whichever is less."
>
> (Pl Ex, p 2)

The effect of Amendment 5

Absent Amendment 5, Hanna was required to operate the smelter at the maximum practicable rate (Article V) and deliver all contained nickel produced at the smelter to the Government (Article VIII). The Amendment relieved Hanna of these obligations (Pl Ex 59, p 2). Under its terms, the time for delivery of the remaining quantities was extended from June 30,

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8. See also Def Ex 113, Hanna's response to the Government's initial demand that the ceiling price be reformed, dated June 21, 1962.

1962 to June 30, 1965 (Pl Ex 59, p 4), giving Hanna the opportunity to use most of the smelter's production during that period to develop a commercial market; the Government afforded it a market for the rest, at a price favorable to the Government.

It was clear that Hanna would not have to operate the plant at the maximum practicable rate required by the contract in order to make the remaining deliveries to the Government on the extended delivery schedule. The Government, on the other hand, wanted to be protected against paying more for the remaining nickel than the cost of production it would reasonably expect to pay if the plant were operated at the maximum rate (Pl Ex 136, 5-D). Consequently, it insisted on a sharply reduced ceiling price, which was negotiated at an amount equal to Hanna's average production cost per pound -- as then calculated -- of contained nickel delivered during each calendar year, but not to exceed 58.77¢ per pound.

Contemporaneously with the amendment, Hanna made the residual and other payments required under the contract, and it was terminated except for the Government's right to buy the remaining nickel over the extended period of three years. Deliveries under Amendment 5 were made only during 1961 (R 298-299; Pl Ex 21), and Hanna's actual average production cost during that year, operating at capacity, was 61.95¢ per pound (Def Ex 123; R 333). Out of a total production of 20,650,142 pounds during that year, 2,186,409 pounds of nickel were delivered to the Government at the new ceiling price of 58.77¢ per pound -- more than 3¢ per pound <u>below</u> Hanna's actual cost of production (Pl Ex 21).

The 1964 termination agreement

On November 8, 1963 the Government filed its complaint, asking, among other things, that the agreed ceiling price be reformed to an even lower figure of 57.70¢ per pound and seeking judgment on that basis for $23,395 allegedly overpaid for 2,186,409 pounds of contained nickel which had been delivered after March 31, 1961 -- despite the fact that the Government had received this nickel at a bargain price of more than 3¢ a pound less than it had cost Hanna to produce (R 6, 7). The Government's theory was that the agreed ceiling price had been based on a formula consisting of Hanna's reported 1960 production costs, less the difference between Hanna's reported 1959 and 1960 production costs, which the parties had assumed to be correct, and that it should be reformed to reflect whatever change in these figures might result from any reallocation to capital expenditures of items charged to production in 1959 and 1960, respectively.

As of March, 1964 there had been no further deliveries to the Government (Pl Ex 21). There remained 17,313,454 pounds which Hanna was obliged to deliver and which the Government was obliged to purchase. The Government preferred to accept a cash payment in lieu of delivery of the nickel. Hence a termination agreement was entered into dated March 5, 1964, under which the parties' purchase and sale obligations as to the remaining nickel under Amendment 5 were terminated and Hanna paid the Government $2,175,000, representing the approximate spread between the market and contract price for the remaining pounds. Since the Government's claim for reformation of the agreed ceiling price in

Amendment 5 was pending, it was agreed that if the court should reform the stated ceiling price of 58.77¢ downward, Hanna would pay, in addition, a sum equal to 17,313,454 times the amount of any such reduction (Pl Ex 3).

The District Court found that the "price was computed by an agreed formula which was based upon the difference between the Company's costs of production in 1959 and 1960" (R 395). On this ground, it disregarded the parties' agreement and reformed the agreed ceiling price of 58.77¢ per pound downward to 57.53¢ to reflect the reduction in Hanna's 1959 and 1960 production costs resulting from the reclassification of 38 items from production costs to capital expenditures (R 466).

b. The record proves conclusively that the parties agreed on a price, not a formula.

The following conclusions, which are required by the evidence, are dispositive of the Government's claim.

1. Hanna's proposed figure of 60¢ per pound was an estimate of its unaudited 1960 production costs, and it was used only to estimate Hanna's actual future production costs as a basis for establishing an agreed ceiling price which was to be sufficient to cover them. [9]

2. The Government wished to be protected against

---

9. The ceiling price established in Amendment 4 to DMP-50 (effective November 8, 1957) was also based on estimates of costs incurred in a prior but unaudited period (Pl Ex 16, p 3; see also DMP-50, Pl Ex 1, p 7).

increases in future costs resulting from periods of low production.

3. The Government's proposal was also an estimate of Hanna's actual future production costs, which it sought to justify on the ground that it reflected Hanna's reduced costs between 1959 and 1960. The asserted "formula" was merely an argument by which the Government sought to convince Hanna that the suggested price of 58.77¢ would recover Hanna's actual future costs of production.

4. Hanna accepted the Government's proposal for a ceiling price of 58.77¢ per pound, which was well under its own proposal and far under its average actual costs during 1961, all of which would have been recovered in the price of the nickel if Amendment 5 had not been executed (Pl Ex 136, 6-D). There is no evidence or any basis for inferring that Hanna accepted a "formula."

5. The effect of the trial court's decision was to increase by 1.24¢ per pound the difference between Hanna's actual production costs of 61.95¢ per pound during 1961, when all further deliveries were made, and the below-cost ceiling price under Amendment 5 -- even though the parties had sought by Amendment 5 to secure for Hanna a price which would recover its actual production costs and merely protect the Government against paying "any more for the ferronickel to be delivered over the period of 4¼ years than it would pay were the material to be delivered over the course of the next year to 15 months

as provided in our Contract DMP-50" (Pl Ex 136, 5-D).

6. These negotiations took place in early 1961, at a time when both parties knew that Hanna's 1960 cost figures had not yet been audited as authorized by DMP-50, and as had been done theretofore for preceding years (R 208-211, 391-394). Amendment 5 does not refer to Hanna's 1960 costs or provide for recomputing the price following an audit.[10] Instead, the parties negotiated and agreed upon a flat ceiling price permitting them to avoid the uncertainties and conflict which such a procedure would have involved.

c. As a matter of law, the trial court erred in granting reformation.

1. There is no evidence supporting a finding that the parties made any agreement other than the one set forth in Amendment 5 or that they would have made a different contract if the results of the future audit and the decision of the District Court had been foreseen. Their error, if any, related only to an extrinsic fact which they assumed to be true. Reformation is not available in such a case.

> "It is not enough to justify reformation that the court is satisfied that the parties would have come to a certain agreement had they been aware of the actual facts. * * *"[11]

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10. In this respect Amendment 5 does not differ from prior amendments which set a stated ceiling price for the future which was to apply regardless of what adjustment in production costs might result from subsequent audit. See footnote 9, p 71 above.

11. Even this was not shown in this case.

* * * * *

" * * * /I/f, because of mistake as to an antecedent or existing situation, the parties make a written instrument which they might not have made, except for the mistake, the court cannot reform the writing into one which it thinks they would have made, but in fact never agreed to make."

5 Williston on Contracts (Rev Ed) 4341, 4344-4345 (§§ 1548, 1549)

"If two parties are caused to enter into a contract by reason of their common ignorance or common mistake as to some fact, but for which they would not have agreed, this may be ground for rescission, but it is not ground for reformation. Proof of such a mistake as this does not show that the parties have ever expressed assent, orally or otherwise, to any contract other than the one that is written. That writing truly expresses the only terms on which they have ever agreed. It may be subject to rescission for mistake; but there is no other agreement in accordance with which it can be 'reformed.'"

3 Corbin on Contracts (1960 Ed) 728-729 (§ 614)[12]

Similarly, in E. R. Brenner Co. v. Brooker Engineering Co., (1942) 301 Mich 719, 4 NW 2d 71 a prime contractor and a subcontractor entered into a settlement of their obligations based on a schedule of all remaining expenses and liabilities. As it turned out, however, there was an obligation to pay an additional insurance premium which was not included in the schedule. The subcontractor sued to reform the agreement to include the amount of the unanticipated premium. The court denied relief, saying:

"The parties made their contract upon the erroneous assumption that the schedule of expenses and liabilities was accurate. But there is insufficient evidence in this record to show that defendant ever agreed to reimburse plaintiff for its expenses

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12. See also 4 Pomeroy's Equity Jurisprudence (5th Ed) 1000-1001; ALI Restatement of Contracts, § 504 (comment c); Patterson: Relief for Unilateral Mistake, (1928) 28 Col L Rev 859 at 900-904.

> and liabilities irrespective of the amount. * * * the parties never contemplated that there would be an additional insurance premium liability. * * * In the record before us there was at best only a mutual mistake as to an extrinsic fact. * * * If the mistake is with respect to an extrinsic fact, although one which probably would have caused the parties to make a different contract, reformation will not be allowed, because courts cannot make a new contract for the parties."
>
> (4 NW 2d at 73)

Maryland Casualty Co. v. United States, (CCA 8 1948) 169 F2d 102 was an action by a subcontractor to recover for labor furnished to the prime contractor in the construction of a military facility. He recovered judgment, and the prime contractor appealed, contending that the unit prices provided in the subcontract were the product of a mutual mistake as to the Government's payment obligations under the prime contract. The court denied reformation:

> " * * * Even if it could be said from the evidence, as certainly it can not, that both King and Briggs entered into the contract sued on in the mistaken belief that the Tertelings would receive 80 cents a cubic yard for the construction of the 9 inch subbase unconditionally and in all events, the result would be only to show that they were mistaken as to a fact assumed by them to be true. But this would not justify the court under the evidence in the present case in writing for them a contract which clearly they did not write. * * *"
>
> (169 F2d at 112)

In Russell v. Shell Petroleum Corporation, (CCA 10 1933) 66 F2d 864 the defendant negotiated an oil lease on the mistaken assumption that the lessor owned only the south half of a certain parcel of land. The lease was drawn to cover only the south half of the property. In fact, the lessor owned a part of the north half as well. The court denied relief, describing the case as

one in which

> " * * * a mistake as to facts extrinsic to the oral negotiations and the contract led Kirkbride to make a contract which he would not have entered into had he understood the true facts, but the contract as written was exactly as he intended it to be; it expressed the very terms he intended."
>
> (66 F2d at 866)

> "To justify reformation on the ground of mistake, the mistake must have been made in the drawing of the instrument and not in the making of the contract which it evidences. * * * A mistake as to the existing situation, which leads either one or both of the parties to enter into a contract which they would not have entered into had they been apprised of the actual facts, will not justify reformation. It is not what the parties would have intended if they had known better, but what did they intend at the time, informed as they were."[13]
>
> (66 F2d at 867)

In Power Service Corporation v. Joslin, (CA 9 1949) 175 F2d 698 at 704 this Court said:

> "We have previously indicated our disagreement with any assertion that the Corporation rightly assumed that the shortages were less than they actually were. But assuming a mistake existed, and that both parties made it, it is not such a mistake as warrants reformation. There was no mistake as to the language of the contract and the specifications. Nothing intended to be inserted was omitted by mistake. The mistake, if any, related to how much of the materials was on hand. Such a situation does not warrant reformation."[14]

2. The parties to Amendment 5 knew in March, 1961 that Hanna's 1960 cost figures had not been audited. They also knew that the Government was entitled to audit them and would do

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13. The court also denied relief on the additional ground that the mistake was not mutual.

14. See also Rock-Ola Mfg. Corp. v. Filben Mfg. Co., (CCA 8 1948) 168 F2d 919 at 923.

so, as it had consistently done before. The parties were ignorant -- and knew they were ignorant -- of the results of that future audit, and they made their agreement without reference to it and without regard to those results. Their agreement for a flat ceiling price of 58.77¢ per pound entered into on that basis cannot be reformed. In Harley v. Magnolia Petroleum Co., (1941) 378 Ill 19, 37 NE 2d 760 at 765 the court said:

> "* * * /W/here the parties to an agreement enter into it in the face of their conscious present want of knowledge of facts, which they all thus manifestly conclude would not influence their action or induce them to refrain from entering into the agreement, whatever the facts might be, there is not such mistake of fact as to constitute ground for reformation of the agreement. * * *"[15]

The Government's claim does not proceed on the basis that the parties intended to fix a price, but instead that they intended the agreed ceiling price to be open for redetermination after audit, a conclusion which is wholly unsupported by the evidence and is contradicted by the terms of Amendment 5, which provides only for the flat ceiling price which had been negotiated between them.

Nor is it consistent with the purpose of the Amendment. Hanna's costs in 1961 and any future years of actual production which would govern if lower than 58.77¢, were obviously unknown as of March, 1961, and were intended to be a variable. The ceiling price of 58.77¢ per pound, by contrast, was fixed. The two together gave the Government the protection it sought. The Government, by its present claim, would rewrite the contract to

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15. See also Almer Coe and Co. v. American Nat. B. & T. Co. of Chicago, (1963) 44 Ill App 2d 104, 194 NE 2d 14 at 16-17; Anno: 137 ALR 908 (1942).

make both factors variable. It would impose, instead of the agreed ceiling price, a formula based upon (a) whatever 1960 costs might prove to be after audit and (b) whatever 1959 costs might prove to be after reaudit (Hanna's 1959 costs had been audited before Amendment 5 was signed, see R 209A). This, however, is not what the Amendment says. The Amendment makes no reference whatsoever to any formula, or to 1959 costs, or to 1960 costs, or to any audit or reaudit. It simply provides that the ceiling price shall be 58.77¢.

3. The Government's asserted formula (1960 costs minus the difference between 1959 and 1960 costs) happens to result in a net gain to the Government -- since nearly all of the items successfully challenged by the Government were paid for in 1960. However, the mathematical effect of the Government's "formula" is that a reduction of 1959 costs operates to raise the ceiling, while a reduction of 1960 costs, where most of the Government's claim lay, operates to lower the ceiling.[16] If a reaudit of 1959 costs had operated to reduce costs for that year and 1960 costs had remained the same, the Government, under its formula theory, would owe money to Hanna. We can only speculate as to whether in that situation the Government would argue, as it now does, that the agreed ceiling price was not a fixed figure but a formula whose components could only be ascertained at some future time.

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16. Of the 216 items which the Government finally submitted, 24 items costing $135,800.04 were paid for in 1959, and 17 items costing $215,768.60 were paid for in 1960 (Pl Ex 170, 174).

4. The burden of persuasion necessary to support a decree of reformation is an unusually heavy one. Such a decree must be based on evidence

> " * * * that is plain and convincing beyond reasonable controversy * * *. A mere preponderance of the evidence is not sufficient. * * *"
>
> Maryland Casualty Co. v. United States, supra, (CCA 8 1948) 169 F2d 102 at 112 (and cases there cited)[17]

To sustain this decree, there must be plain and convincing evidence that the parties did not in fact agree upon a ceiling price as set forth in Amendment 5, but rather upon a formula for determining a price and that the true contract was for whatever ceiling price that formula might produce. The evidence must be plain and convincing to show that the parties so far relied on the formula that Hanna would have accepted a ceiling price of 57.53¢ per pound if the Government had offered it, based on the "formula," during the negotiations. The evidence must be plain and convincing that the parties agreed that the ceiling price would be subject to adjustment upon final audit. Finally, the evidence must be plain and convincing that the parties intended these things to be a part of their agreement in Amendment 5. In fact, none of these is shown or supported in the record. There is no evidence that anything intended to be put into or to be a part of Amendment 5, which was long and carefully negotiated by skilled Government negotiators, is not there. The error, if any, was not in the terms of the contract, but as to the circumstances surrounding the making

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17. See also Moyer v. Title Guaranty Company, (1962) 227 Md 499, 177 Atl 2d 714 at 715-716 (requiring "proof of the highest order"); Hayes v. Travelers Ins. Co., (CCA 10 1937) 93 F2d 568 at 571.

of it. Reformation is not an available remedy in such a case.

d. The gross inequity of the trial court's decision to reform the agreed ceiling price must be emphasized. The record makes clear that the purpose of the ceiling, from the Government's viewpoint, was to avoid paying more by reason of the extended delivery schedule than it would have paid if deliveries had been made under the original contract terms. Hanna's actual production costs at full production proved to be 61.95¢ -- substantially higher than expected. The trial court, however, reformed the agreed ceiling price downward to reflect a purely extrinsic and collateral circumstance.

> "The reformation of instruments is purely an equity remedy and its every application must lead to equitable results. * * *"
>
> M. T. Straight's Trust v. Commissioner of Internal Rev., (CA 8 1957) 245 F2d 327 at 329

If the record suggests anything about an agreement concerning costs, it is that the parties would have agreed on 61.95¢ if they had known that this is what Hanna's average actual costs of production of delivered nickel would be. The Government, having had full protection against Hanna's higher production costs during the delivery period, now seeks to increase the spread between those costs and the contract price of delivered nickel and increase Hanna's payment obligations under the termination agreement. The District Court's decree of reformation was inequitable as well as wrong, and it should be reversed.

II.

The District Court abused its discretion and erred in awarding prejudgment interest.

In actions to recover money due the Government at a fixed time, interest can be awarded from the due date as damages for delay. Royal Indemnity Co. v. United States, (1941) 313 US 289 at 295-296. This, however, as applied to actions to recover money improperly paid, is a rule of limited application.

> " * * * The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable. * * *"
>
> Jackson County v. United States, (1939) 308 US 343 at 352

In this case, the District Court allowed prejudgment interest on overpayments which it found the Government had made for nickel on the ground that the cost of each of the 38 reallocated items was undisputed and the company "had the use" of the Government's money during the prejudgment period (R 467).

The circumstances recited by the court are insufficient on this record to support the allowance of prejudgment interest, and the court abused its discretion in awarding it.[18]

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18. Hanna contends that the record does not support any award of prejudgment interest; alternatively, that the trial court erred as a matter of law in allowing interest for a period prior to the Government's demands for reimbursement (p 86 below).

a. The amount found to be owing was an unliquidated fraction of the Government's claim, and at no time could Hanna calculate and tender the amount of its indebtedness.

Prejudgment interest is disallowed on claims whose amounts are essentially incapable of ascertainment before trial, in the absence of circumstances making such award "necessary" as an element of damages. Miller v. Robertson, (1924) 266 US 243 at 258.[19] None have been suggested in this case.

The Government's claim for reimbursement was not in any realistic sense liquidated. It was asserted from time to time commencing March 14, 1962 in varying -- but always increasing -- amounts. While the amount of money involved in most (but not all) of the 284 items was known, the Government's objections to 246 items constituting more than 85% of its dollar claims were either abandoned or disallowed. The Government's good faith in preparing and prosecuting this action is in substantial doubt, for it abandoned its objections to 68 items totalling more than $346,000 on the very day of the July trial,[20] after Hanna had been put to the trouble and expense of preparing to defend against them (R 334, 378; July Tr 7, 37). In short, an

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19. See also Southern Painting Company of Tenn. v. United States, (CA 10 1955) 222 F2d 431 at 435:

> " * * * Obviously, it would be unfair and inequitable to exact interest when the amount of an asserted claim is in dispute in good faith and could not be determined until after a judicial inquiry and sifting of all the facts."

20. The equitable defenses were segregated and tried on October 2-3, 1964. The remaining issues were tried on July 20-22, 1965.

indiscriminate and oppressive claim for nearly $2,000,000 was substantially defeated, and Hanna's accounting decisions and practices were substantially approved by the trial court.

Not only was the Government's claim grossly overstated; it consisted of a host of items requiring detailed accounting treatment under varying accounting principles, as to all of which there was extensive expert testimony by eminent accountants, and at no point prior to a judicial sifting of this long and complex record could Hanna have determined what it owed. The Government's claim was not for a fixed amount due. The amount owing was incapable of ascertainment, and it was inequitable and wrong to treat the claim as one for a fixed amount.

In Lundgren v. Freeman, (CA 9 1962) 307 F2d 104 at 111-112 this Court reversed an award of interest on the net amount found by arbitrators to be owing a contractor on disputed billings. The question under applicable Oregon law was whether the amount of the claim was ascertainable. Judge Duniway held that it was not:

> " * * * Cross demands and claims by Lundgren and school district, as to many disputed items, were submitted to the arbitrators. Many were allowed; many more were not. It cannot fairly be said that the net amount due Lundgren was ascertained or ascertainable until the arbitrators made their award."

In United States v. Campbell, (CA 9 1961) 293 F2d 816 at 819-820 a claim under the Miller Act was held to be uncertain in amount in a case which arose from differences of opinion over proper accounting practices under an equipment lease. The

lessor had asserted excessive claims for equipment rental against the lessee's sureties. The Court, by Judge Barnes, said:

> " * * * The court, in the instant case, held that the amount claimed was in dispute and uncertain because plaintiff sought, in each complaint, rental in excess of any possible amount that it was entitled to recover. Appellant counters that it had no choice but to claim the full amount of unpaid rent against both sureties for it then had no access to the records of the subcontractor and therefore no basis for allocating the rental charges between the two jobs. Whatever the reason behind appellant's position may be, it is clear, in view of the hot dispute over the proper principle of allocating the rent already paid, that the amount due appellant could not be made certain by mere calculation. The court was correct in refusing interest on the ground that the claim was unliquidated * * *."[21]

Hanna's indebtedness was only a small part of a large and complicated claim, a substantial part of which should never have been asserted and was abandoned at the commencement of the second trial. The balance of the Government's claim was vigorously, and, in major part, successfully resisted. Allowance of prejudgment interest on the relatively small part of this wholly indefinite obligation as to which the Government prevailed was a harsh and inequitable imposition.

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21. See also Carlstrom v. Agricultural Ins. Co., (CA 9 1950) 180 F2d 286 (interest disallowed under California law where amount due on insurance claim was incapable of calculation because claim was grossly overstated).

b. The Government benefited, at no cost to it, from the reclassified expenditures on which the District Court allowed interest.

The six major items of expenditure which the court reclassified as capital expenditures accounted for $215,109.90 of the total of $231,506 awarded with respect to all reclassified items (R 388-389, 465, 468). All of the disputed items reduced costs or were essential to the continued operation of the plant (Oct Tr 46-47, 58). Substantial cost savings to the Government resulting from the acquisition of items reclassified by the trial court were shown by Hanna's uncontradicted evidence (Oct Tr 50-52; Def Ex 110).

Hanna was not obligated under the contract to install these items, for which the Government thereafter insisted Hanna must not be reimbursed, and it is grossly inequitable that the benefit conferred upon the Government at Hanna's expense as a result of the District Court's ruling on the merits should be compounded by the award of prejudgment interest. The Government has already received the benefit of Hanna's use of the money.

Swift & Company v. United States, (CA 4 1958) 257 F2d 787 at 796, cert den (1958) 358 US 837

Land O'Lakes Creameries, Inc. v. Commodity Credit Corp., (CA 8 1959) 265 F2d 163 at 166

III.

The District Court erred in allowing interest for a period prior to the Government's demands for reimbursement.

Even if (which Hanna denies) this was a case in which the trial court could award prejudgment interest at all, the amount which it allowed was grossly excessive. The District Court expressly found that there was no evidence that Hanna acted wrongfully or failed to make its accounting decisions and practices known to the Government (R 395). Consequently, Hanna's receipt of the money was not wrongful, and its obligation to repay it did not arise until the Government demanded reimbursement of amounts which the trial judge allowed. Interest does not commence to run until payment is due,[22] and it follows that the District Court erred in awarding interest for a period prior to those demands.

The six major items of expenditure which the District Court reallocated to capital expenditures were as follows:

Item	Description	Amount
131	Sawdust System	$ 92,832.80
107/123	Pig Casting Machine	56,185.68
106/122	Microdyne Wet Dust Collectors	37,816.42
130	Scoopmobile	28,275.00
	TOTAL	$ 215,109.90

(Pl Ex 175, p 1, Category 1a)

Of these items, all but 106/122 (the dust collectors)

22. McCormick on Damages (1935) 229 (§ 58); ALI Restatement of Contracts, § 337.

were included in the Government's demand for $210,605 which Hanna received on March 16, 1962 (Def Ex 125; see also Pl Ex 23, p 1).[23]

The larger billing for $252,147 which Hanna received on July 13, 1962 included the same items and claimed, for the first time, reimbursement of part of the price paid for nickel delivered after March 31, 1961 (Pl Ex 23).[24] The claim for the dust collectors (Items 106/122) and the minor items was first asserted in the Government's itemized bill for an additional $1,564,811 which Hanna received on January 28, 1963 (Pl Ex 61).[25]

If prejudgment interest is properly allowable at all (which Hanna denies), interest on each item of the award commenced only when it was demanded by the Government. Thus, interest on the amount allowed for the dust collectors ($37,816.42) and the minor items ($16,396.38) commenced on January 28, 1963 and amounted to $10,551.22 on April 27, 1966, the date of the judgment; interest on the award for partial reimbursement of the price of nickel delivered after March 31, 1961 ($27,111.49) commenced on July 13, 1962 and amounted to $6,163.46; and interest on the award for the remaining items ($177,293.48) commenced on March 6,

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23. The dollar amounts of that claim were slightly different from the figures set forth in Pl Ex 175, and it included claims for additional items which were thereafter abandoned or reclassified in other categories.

24. This claim, which was for $41,542, was excessive; only $27,111.49 was allowed by the District Court (R 466).

25. By the time of trial, this figure had been adjusted. See p 97, fn 31 below).

1962 and amounted to $43,773.55. If prejudgment interest could be allowed at all, it could be calculated only from those demand dates in a total amount, down to April 27, 1966 (the date of the judgment), of $60,488.23.

The District Court found that "there is no evidence that the Company acted wrongfully or failed to make its accounting decisions and practices known to the Government" (R 395). In the absence of bad faith or fraud,[26] Hanna's possession of the funds was not wrongful prior to the Government's demands. The obligation to reimburse the Government did not mature, and interest could not commence to run before those dates. Washington Ry. & E. Co. v. Washington, B. & A. Electric R. Co., (CA DC 1929) 32 F2d 406 was an action to recover sums which the defendant, "owing to oversight or misinterpretation of the contract," had incorrectly billed to the plaintiff with respect to fares of passengers transferred between the two lines. The defendant's erroneous accounting method had been accepted by both companies until the mistake was discovered. The court held that the trial court correctly computed interest from the date of the plaintiff's demand for reimbursement. It applied the rule that

> "' * * * when a mutual mistake occurs between the payer and receiver of a sum of money, by which the whole has not been paid, or too much has been received, interest is not recoverable on the sum so withheld or received, unless it has been unjustly withheld or unjustly received. The party retaining the money by mistake, may well rely on the acquittance received

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26. That guilty knowledge or a fraudulent purpose can justify an award of interest from the date of payment, see United States v. United States F. & G. Co., (1915) 236 US 512; United States v. Rodiek, (CCA 2 1941) 120 F2d 760.

or given, until the injured party makes known his claim and demands correction and payment. After such demand, if it be refused, and it turns out that there was money due which ought to have been paid, it will bear interest from demand until paid.' * * *"

(32 F2d at 410)

In Reconstruction Finance Corp. v. Service Pipe Line Co., (CA 10 1953) 206 F2d 814 it was claimed, following an audit, that oil subsidies had been improperly paid to the defendant. The court held that the obligation was one which matured only on demand.

" * * * If the determination of the governmental agency is invalidated, the question of interest will be moot. If, however, the determination is upheld, the Pipe Line Company has had the use of the government's money under an expressed and implied promise to return it upon demand. That demand was made on October 18, 1946, and it follows that in justice and fairness, the Pipe Line Company should pay just compensation for the use of the money during the time it was erroneously withheld. * * *"

(206 F2d at 818)

In Schindler v. Ross, (1958) 182 Kan 227, 320 P2d 813 at 819 the court said:

" * * * This, as we have previously indicated, was an action on implied contract to recover money paid under a mistake of fact. Moreover, it is clear from the record, in fact the trial court found, that at the time of receiving the involved payments the appellant did not know she was being overpaid. The general rule, which we believe to be sound and to which we therefore adhere, is that where money has been paid and received through mutual mistake of fact, without fraud or misconduct on the part of him to whom the money was paid, interest does not begin to run and will not be allowed until the mistake has been discovered and demand for repayment made. * * *"[27]

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27. See also LaParr v. City of Rockford, Ill., (CCA 7 1938) 100 F2d 564 at 568-569; 87 ALR 649 at 652 (1933); 5 Williston on Contracts (Rev Ed) 3943 (§ 1415).

The award of interest was improper in its entirety, for reasons set forth above (pp 81-85). Separately, the inclusion of interest for a period prior to the Government's demands for reimbursement ($26,840.34 of the total sum awarded) was erroneous as a matter of law, because there was no indebtedness or wrongful refusal to pay until Hanna received the Government's demands.

CONCLUSION

The District Court erred in reforming the agreed ceiling price in Amendment 5 and there is no factual or legal decision for concluding that the parties did not agree upon a price but instead upon a formula. The District Court abused its discretion and erred in allowing prejudgment interest. The judgment in favor of the Government should be reduced to $231,506.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of the foregoing brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney

TABLE OF EXHIBITS

(Pursuant to Rule 18(2)(f))

EXHIBIT	IDENTIFIED	OFFERED AND RECEIVED
Plaintiff's Exhibits		
1 through 80	R 246-249	Oct Tr 3-4
82 through 178	R 315-318	July Tr 2
179	July Tr 235	July Tr 235
Defendants' Exhibits:		
1 through 110C	R 241-245	Oct Tr 3
113 through 130	R 324	July Tr 2

APPENDIX A

Contract Provisions Material to the Dispute[1]

Article IV:

Article IV (entitled "Facilities"), as amended by Amendments 3 and 4:

> "With advances made by the Government as provided in Article VI, the Contractor will construct and equip * * * a facility for the conversion of ore from the mine into saleable ferronickel. The period * * * to and including December 31, 1954 is hereinafter called the 'Break-In Period.' During the period beginning January 1, 1955 and ending * * * not later than September 30, 1955 /hereinafter called 'Period 1'/ the facility shall consist of one electric refining furnace, two electric melting furnaces, one electric ferro-silicon furnace, one electric slag melting furnace, a slag-disposal site and equipment, a stockpile site and stockpiling equipment, a sewage-disposal plant, railroad spurs, housing for personnel, preliminary construction and foundations for two additional electric melting furnaces and facilities as may be required after Period 1 /not later than September 30, 1955/, and all equipment and facilities agreed to by the Government as necessary for such conversion of ore from the mine into saleable ferronickel. * * * The facility, as it exists from time to time as contemplated by this Article or as it may be substituted for from time to time with the approval of the Government, is hereinafter called 'the Facility.'"

Article VI:

Paragraph 1 of Article VI (entitled "Advances"), as amended by Amendments 3 and 4:

> "Upon the Contractor's written request, the Government will make advances (hereinafter called 'Capital Advances') of the entire amount up to a total of $22,875,000 * * * required * * * (b) to construct, equip, design and rebuild the Facility contemplated by Article IV (including all costs and expenses of every

1. These provisions are those relied on by the Government (R 205-208).

nature arising from operations or otherwise during * * * the Break-In Period * * * and including all costs and expenses incurred * * * within Period 1 * * * when both electric melting furnaces are shut down by reason of constructing, equipping, designing, rebuilding or repairing said furnaces or related equipment * * * (c) for such replacements or improvements of the Facility which are agreed by the Contractor and the Government to be necessary or advisable * * * and (d) for such other necessary and so agreed upon expenditures which, in accordance with generally accepted accounting practice, are capitalized. * * * As soon as practicable after the end of each calendar month, the Contractor will submit to the Government a cumulative statement of the cost of the Facility in such detail as the Government may reasonably request."

Paragraph 2 of Article VI (entitled "Advances"), as amended by Amendments 3 and 4:

"Upon the Contractor's written request * * * the Government will advance to the Contractor sums (hereinafter called 'Working Capital Advances') representing its reasonable minimum working capital requirements so long as the sum of such request plus Working Capital Advances then outstanding does not exceed $3,750,000. * * * Working Capital Advances may be requested and used by the Contractor to pay any costs and expenses hereunder of the Contractor including costs arising from the payment of tax liability or other source, not covered by Capital Advances and which are in excess of funds then available from the sale hereunder of ferronickel at the prices herein set forth."

Paragraph 3 of Article VI (entitled "Advances"), as amended by Amendment 3:

"Capital Advances and Working Capital Advances shall be kept in separate accounts at a bank or banks approved by the Government; shall not be commingled with each other or with other funds; shall bear interest at 5% * * *; shall be evidenced by a note or notes * * *; and shall be secured as in Article XVIII provided. Interest on Capital Advances * * * shall be added to the amount of Capital Advances * * *."

Article VIII:

Paragraph 1 of Article VIII (entitled "Sale and Purchase of Ferronickel"), as amended by Amendments 3 and 4:

"The Contractor will sell to the Government and the Government will purchase from the Contractor, all saleable ferronickel produced by the Facility during the period of this contract up to a maximum of 125,000,000 pounds of contained nickel in ferronickel * * *, the price per pound of contained nickel shall be determined by adding (a) the Contractor's actual cost of production per pound of contained nickel (but not more than 75¢ escalated as hereinafter provided * * * and (b), but only in the case of the first 95,000,000 pounds of contained nickel in ferronickel produced after the beginning of Period 1 and sold to the Government, an amount per pound of contained nickel (hereinafter called 'Amortization Payment') sufficient to amortize the Capital Advances made pursuant to Article VI plus interest thereon. * * * The Contractor's actual cost of production included in the price for ferronickel sold hereunder shall never exceed the applicable ceiling fixed above, as escalated, but subject to such applicable ceiling, shall mean and include (a) until the end of the three year period from the calendar quarter commencing closest to the beginning of Period 3, all theretofore unrecovered costs and expenses hereunder of the Contractor (including any previous overrun of costs of production over the then applicable ceiling) not covered by Capital Advances and which arise from operations, payment of royalties, management and consultants' fees, insurance, interest on Working Capital Advances, state and local taxes, or other sources, excluding federal income taxes and (b) thereafter, for each running period of three consecutive years, only such costs and expenses (but not including any overrun of costs of production over the then applicable ceiling) as are incurred during or with respect to such three year period. * * *"

APPENDIX B

Analysis of Trial Court Judgment (R 468-469)

Judgment items disputed by Hanna on cross appeal:

Prejudgment interest on $231,506.00 awarded as overpayment for nickel delivered under DMP-50	$ 79,603.87	
Prejudgment interest on $27,111.49 awarded as overpayment for 2,186,409 pounds of nickel delivered under Amendment 5	7,724.70	
Amount awarded on reformation claim as overpayment for 2,186,409 pounds of nickel delivered under Amendment 5	27,111.49	
Additional payment under termination agreement for release of 17,313,454 pounds of nickel, based on reformation of purchase price in Amendment 5	214,686.83	
	$ 329,126.89	$ 329,126.8

Judgment items not disputed by Hanna on cross appeal:

Amount awarded with respect to 38 items reallocated to capital expenditures from cost of production of nickel delivered under DMP-50 prior to Amendment 5	$ 231,506.00	$ 231,506.0
TOTAL AMOUNT OF JUDGMENT		$ 560,632.9

APPENDIX C

Statement of the Facts

This litigation arises out of Contract DMP-50 (Pl Ex 1) dated January 16, 1953 between plaintiff United States, acting by and through the Defense Materials Procurement Agency (DMPA)[1] and defendant Hanna Nickel Smelting Company. That contract was one of three related contracts between DMPA and subsidiaries of The M. A. Hanna Company under the Defense Production Act of 1950, as amended (50 USC App § 2061), to expand the nation's productive capacity for nickel and the domestic supply of nickel available to the United States (R 215-216; Def Ex 82, pp 1-2).[2] Plaintiff sued to recover $1,739,328[3] which it claimed was improperly included in the price of nickel purchased from Hanna under the contract before it was terminated on March 5, 1964.[4] It also

---

1. In August, 1953, DMPA was abolished and its functions were transferred to General Services Administration (GSA), and particularly to a subdivision of GSA then known as Emergency Procurement Services (EPS) and now as Defense Materials Services (DMS) (R 214).

2. The other contracts were with defendant Hanna Coal & Ore Corporation, whose name was changed to The Hanna Mining Company in 1958 (R 214, 216). It is referred to herein as "mining company."

3. See R 3-4; this figure was reduced to $1,738,598 in the supplemental pretrial order (R 304); it was further reduced to $1,392,377 at the commencement of the second trial, when the Government abandoned $346,222 of its claim (R 334, 378; Pl Ex 170; July Tr 37, 40, 49).

4. Plaintiff also sought interest from the respective dates of overpayment (R 6; Pl Ex 170). An additional claim for $54,235 asserted in Count 2 of the complaint was paid and was dismissed before the second trial (R 299-300).

sought an additional $23,395[5] through reformation of the agreed ceiling price for nickel contained in an amendment to the contract applicable to nickel delivered in 1961 and a reduction in the price of the balance of nickel to be delivered under the contract (R 5-7, 305-306).

The three contracts were as follows:

1. Contract DMP-49 provided that the mining company would open and develop a nickel bearing ore deposit at Riddle, Oregon, and sell ore mined from the deposit to the Government at a fixed base price (R 216; Def Ex 82, p 13).

2. Contract DMP-50 provided that the smelting company, with money advanced by the Government, would construct and operate a smelting facility at Riddle, Oregon using an experimental French refining process. It agreed to purchase ore from the Government for the price the Government had paid the mining company, process the ore and deliver up to 125,000,000 pounds of contained nickel in ferro-nickel to the Government by June 30, 1962 at a price consisting of the cost of production (including cost of ore) and, over the first 95,000,000 pounds only, an additional amount sufficient to amortize the capital cost of the facility with interest (R 216; Def Ex 82, pp 13-14). This litigation arises out of a dispute over the cost of production factor to be included in the price paid by the Government.

3. Contract DMP-51 provided that the mining company

---

5. See R 5-6, 305-306; this claim was increased to $27,986 when the case was submitted (R 379).

would sell the Government's nickel, if the Government ever requested it to do so, to industrial users on a commission basis at rates set by the Government and that the mining company guaranteed the financial obligations of the smelting company under DMP-50 (R 216, 299; Def Ex 82, pp 14-15). The mining company was joined as a defendant on the obligation of that guarantee (R 6). Neither DMP-49 nor DMP-51 is otherwise involved in this litigation.

Under these contracts, commercial production facilities were constructed which by 1958 had an annual capacity of more than 20,000,000 pounds of contained nickel (Def Ex 82, p 17).

The Terms of DMP-50

Under DMP-50, the Government agreed to provide capital advances to the smelting company up to a total of $22,000,000 (Article VI).[6] It also agreed to advance working capital requirements on a revolving fund basis up to a maximum balance at any time of $2,800,000 (Article VI).[7]

Capital advances were to be made

> " * * * (a) to test the process as provided in Article II, including the cost of mining and of shipping to France the quantity of ore from the Mine required for such tests and including the reasonable

---

6. All references are to provisions of DMP-50 which is in evidence as Pl Ex 1. An additional $875,000 was authorized by Amendment 4, executed as of September 30, 1957 (Pl Ex 16, p 2); however, only $300,000 of this was ever requested by Hanna or advanced by the Government, and Hanna returned $27,444 of this amount (R 298).

7. This figure was increased to $3,750,000 by Amendment 4 (Pl Ex 16, p 2).

> expenses of technical observers to attend such tests on behalf of the Contractor, (b) to construct, equip, design and rebuild the Facility contemplated by Article IV (including all costs and expenses incurred during or in respect of any periods of time within Period 1 that production of salable ferro-nickel has ceased by reason of constructing, equipping, designing, rebuilding or repairing the furnaces or related equipment), (c) for such replacements or improvements of the Facility which are agreed by the Contractor and the Government to be necessary or advisable during the period of this Contract, and (d) for such other necessary and so agreed upon expenditures which, in accordance with generally accepted accounting practice, are capitalized. * * *"
>
> (Art VI(1))

Working capital advances, representing the contractor's "reasonable minimum working capital requirements," were defined as follows:

> " * * * Working Capital Advances may be requested and used by the Contractor to pay any costs and expenses hereunder of the Contractor, including costs arising from the payment of tax liability or other source, not covered by Capital Advances and which are in excess of funds then available from the sale hereunder of ferro-nickel at the prices herein set forth."
>
> (Art VI(2))

Both classes of advances were evidenced by notes of the smelting company bearing 5% annual interest on the unpaid balances and were secured by a mortgage of the entire facility, including the real property (Arts VI, XVIII).

The smelting company agreed to buy, at the Government's cost, ore purchased by the Government from the mining company under DMP-49 (Art VII). The Government agreed to purchase all salable ferronickel produced from the ore up to 125,000,000 pounds of contained nickel at a price equal to the cost of production plus an amount (payable over the first 95,000,000 pounds

only) sufficient to amortize capital advances and interest. The cost of production was defined to

> " * * * mean and include (a) until the end of the three year period from the calendar quarter commencing closest to the beginning of Period 3, all theretofore unrecovered costs and expenses hereunder of the Contractor (including any previous overrun of costs of production over the then applicable ceiling) not covered by Capital Advances and which arise from operations, payment of royalties, management and consultants' fees, insurance, interest on Working Capital Advances, state and local taxes, or other sources, excluding federal income taxes and (b) thereafter, for each running period of three consecutive years, only such costs and expenses (but not including any overrun of cost of production over the then applicable ceiling) as are incurred during or with respect to such three year period. * * *"
>
> (Art VIII)

The cost of production component of the price was subject to an agreed ceiling which was to be reduced from 79.39¢ per pound to 60.5¢ per pound after delivery of the first 5,000,000 pounds, and to escalation upward or downward, based on Labor Department and other indices (Art VIII).

The contract contemplated the use of a new and untried refining process, and it provided for a preliminary period of experimentation and testing during which all costs and expenses would be paid for from capital advances (Arts II, VI). Production operations under the contract were to be conducted in three phases (Art IV): Period 1, which was to commence upon completion of the initial facility no later than September 30, 1954 and end on or before September 30, 1955, when Hanna should make its preliminary

determination of technical feasibility;[8] Period 2, which was to end on or before March 31, 1956, when Hanna should make its final determination of technical feasibility; and Period 3, the balance of the contract period. The contract was to end on June 30, 1962, or when 125,000,000 pounds of nickel should be delivered to the Government (Art XIV).[9]

The contract required that the facility be operated at the maximum practicable rate during Period 2 (Art V); additional equipment was to be installed during that period (Art IV), and the facility was to operate during Period 3, following Hanna's final determination of technical feasibility, at the maximum practicable rate, with minimum annual production of 13,720,000 pounds of contained nickel and minimum total production of 95,000,000 pounds over the life of the contract (Art V).

The contract could be terminated by Hanna (a) at any time upon payment of the unpaid balance of the Government's advances, with interest, plus a "residual payment" equal to 7½% of capital advances (excluding capital replacements), the company retaining title to the smelting facility; (b) if the Government

---

8. Technical feasibility was defined as the smelting company's estimate that the facility was capable of converting ore into salable ferronickel in the quantities required by the contract at costs not in excess of applicable contract ceiling prices (Art I). Production during Period 1 was to be subject to any further necessary testing of the process and modifications of the facility (Art V).

9. These dates were modified by amendments to the contract. The beginning of Period 1 was extended to January 1, 1955 (P1 Ex 2, p 2) and the end of Period 2 was extended to September 30, 1957, when Hanna was able to make its final determination of technical feasibility (P1 Ex 16, p 2).

breached either the mining or the smelting contract, in which case Hanna could either convey the facility and all of its assets to the Government and have its liability for advances and interest cancelled, or repay the balance of the advances and interest, together with the residual payment, and retain title to the smelting facility; or (c) if Hanna determined prior to prescribed dates that the process was not technically feasible, in which case Hanna was required to convey the facility and all of its assets to the Government in exchange for cancellation of its liability for advances and accrued interest (Art XIV).

Operations under DMP-50

The smelting facility was built under a subcontract with Bechtel Corporation. Initial construction commenced in 1953 and continued during 1954 and 1955. Production commenced on a limited basis in August, 1954; however, the plant was not brought to regular production until 1955 or to full productive capacity until early 1956. The delay was caused by the need for an extensive period for testing the feasibility of the smelting process in accordance with the contract (R 217; Def Ex 82, pp 16-17). However, production increased in the following months, and by 1958 the facility was producing contained nickel at an annual rate of over 20,000,000 pounds (Pl Ex 21; Def Ex 82, p 17). By the end of September, 1960, 95,327,000 pounds of contained nickel had been sold to the Government, and the capital advance amortization factor in the price paid by the Government ceased to apply (Def Ex 82, p 17).

The General Accounting Office report issued in April,

1961 concluded that the

> " * * * terms of the contract were consistent with the applicable legislation and that the purpose of the contracts has been fulfilled."
>
> (Def Ex 82, transmittal letter, p 1)

Although Hanna sought effectively and in good faith to reduce the cost of production (Oct Tr 94), the process was essentially experimental, and thus by the end of 1956 Hanna had incurred losses on smelting operations under the cost of production ceiling o 60.5¢ amounting to more than $1,900,000 (Pl Ex 17, p 8; Def Ex 82, p

By Amendment 4, dated November 8, 1957, the ceiling price, exclusive of escalation, was increased to 75¢ per pound, which allowed Hanna to recover these losses on subsequent deliveries and, having done so, to operate thereafter on a break-even basis. The amendment also increased the ceiling for capital advances by $875,000 to $22,875,000 and recited Hanna's favorable final determination of technical feasibility on September 25, 1957 (Def Ex 82, pp 18-19; Pl Ex 16; R 219).

By April 20, 1961, when Amendment 5 was executed, total capital advances under the contract amounted to $22,300,000 and working capital advances of $69,945,000 had been made; all of these advances, including interest, had been repaid or otherwise liquidated, except $1,051.44, which was thereafter paid by Hanna. Some $575,000 of authorized capital advances was never requested by Hanna or advanced by the Government, and Hanna refunded $27,444 of unused capital advances, with interest, to the Government (R 298; Pl Ex 87, 88).

As of March 31, 1961, the effective date of Amendment 5,

Hanna had delivered 105,500,137 pounds of nickel to the Government (R 298), which left a balance of 19,499,863 to be delivered by June 30, 1962, when the contract would terminate according to its terms.

Under Amendment 5 Hanna made a negotiated residual payment to the Government of $1,721,653 to discharge the mortgage on the smelting plant, and it was agreed that the remaining 19,499,863 pounds of nickel would be delivered by June 30, 1965 at a price per pound which would repay Hanna's average actual cost of production per pound of contained nickel delivered in each calendar year, not to exceed a ceiling price of 58.77¢ per pound (Pl Ex 59; R 217, 298-299). Between March 31, 1961 and January 1, 1962 Hanna delivered 2,186,409 pounds of nickel (R 299; Pl Ex 21). Its average actual production costs during that period were 61.95¢ (Def Ex 123; R 333); consequently, Hanna was paid only the contract ceiling price of 58.77¢ for those deliveries (R 299).

In March, 1964, in light of the fact that the market price of ferronickel was substantially above the contract ceiling and the Government no longer needed to add ferronickel to the stockpile (Def Ex 98, p 2), Hanna paid the Government the agreed sum of $2,175,000 to release its obligation to deliver the balance of 17,313,454 pounds of contained nickel due under the contract. By reason of the present litigation (which was instituted on November 8, 1963) it was also agreed that if this action should result in a decree revising the ceiling price of 58.77¢ per pound downward in accordance with the Government's prayer, the parties would consider such revision applicable to the termination payment,

and Hanna would repay the Government an amount equal to 17,313,454 times the difference between the contract ceiling price of 58.77¢ and the revised ceiling price (R 299; P1 Ex 3).

The Origin of the Litigation

The Government conducted regular audits of the smelting company's financial operations under DMP-50, with particular reference to the proper allocation of expenses as between capital expenditures and cost of production (R 208-211, 391-395). In July, 1961, following an examination of certain of Hanna's books and records and its accountants' working papers for 1960, the Government asserted that certain expenditures which had been charged to cost of production (and therefore included in the price of nickel charged the Government in succeeding quarters) should have been capitalized (R 211).

On March 14, 1962 the Government demanded reimbursement of $210,605, contending that several expenditures noted in the 1961 audit in that total amount had been improperly allocated to cost of production and included in the price of nickel paid by the Government. Since total deliveries under the contract exceeded 95,000,000 pounds in September, 1960 and the applicable amortization rate was determined as of January 1 each year, the cost of these items could not be amortized in the price of nickel, and the Government contended it had overpaid Hanna for nickel by the amount of their cost, regardless of the fact that additional capital advances were available under the contract (Def Ex 125; see also P1 Ex 23, p 1).[10] On July 13, 1962 Hanna received a

10. The Government contended that unexpended capital advances were not available for these expenditures, which had not been submitted for its prior approval (R 227, 228, 303-304).

demand for $252,147, which included the same items and an additional $41,542, which was claimed on the theory that the reduction in Hanna's 1960 production costs resulting from allowance of the Government's original claim should be reflected in a reduction of the agreed ceiling price of 58.77¢ per pound under Amendment 5, and that the Government was entitled to a refund of $41,542 for nickel delivered after March 31, 1961 (Pl Ex 23; R 211).

From August to December, 1962, the Government conducted a further examination of Hanna's books and records for the period January 1, 1955 to March 31, 1961. On January 28, 1963 the Government presented Hanna with an itemized bill for $1,739,328, asserting that expenditures in that amount for 284 items charged to cost of production should have been capitalized and should not have been included in the price of nickel charged the Government (R 211; Pl Ex 61). This figure was adjusted in minor respects, and in the supplemental pretrial order the Government's claim for the 284 items amounted to $1,738,598 (R 304). At the commencement of the second segment of the trial on July 20, 1965, the Government abandoned its claim to reimbursement for 68 items costing $346,222 on the advice of its "independent accounting consultant" (R 334, 378; July Tr 7, 37). This concession reduced its claim to $1,392,376.55 for 216 items, which had been charged by Hanna to cost of production as follows:

1955 -	$	42,631.63
1956 -		239,454.96
1957 -		559,317.03
1958 -		190,685.96
1959 -		135,800.04
1960 -		215,768.60
1961 -		8,718.33
	$	1,392,376.55

(R 378, 392; Pl Ex 170)

The issue is whether, under the terms of DMP-50, these items were properly charged to cost of production. The trial court held that they were properly so charged to the extent of $1,160,871. The remaining sum of $231,506 is not involved in this appeal.

APPENDIX D

Analysis of Contract Drafts

1. The Government's initial draft ("1st Discussion Draft") of October 13, 1952 (Pl Exs 176, 177) made no reference to generally accepted accounting practice or to "replacements or improvements." It contained no definitions and did not use the term "capital advance." Significantly, however, it provided that advances would be made for the "design, acquisition, installation and necessary rebuilding or modification of the facilities * * *" (Pl Ex 176, p 11). The word "modification" was omitted from Hanna's initial draft of November 24, 1952 (Pl Ex 138, p 6) and the succeeding drafts and does not appear in the final contract.

2. Hanna's initial draft of November 24, 1952 (Pl Ex 138) used the term "capital advances"[1] and provided that such advances should be available to "repair" the facility (at p 6), a provision which was thereafter removed at the Government's insistence (Def Exs 118, 120).[2] Hanna's definition of the facility in Article III (at pp 3-4) contained no reference to generally accepted accounting practice.

Article V, which provided for capital advances, provided that they would be made:

---

1. In Article V, which became Article VI in the final contract. Article III of the draft ultimately became Article IV.

2. In the final contract, repairs are included in the definition of the "facility" (Art IV), but they could not be paid for with capital advances.

> " * * * (a) to construct, equip, design, rebuild and repair the Facility contemplated by Article III, and (b) for such replacements, additions, or improvements of the Facility which are deemed necessary or advisable by the Contractor during the period of this Contract and which, in accordance with generally accepted accounting practice, are capitalized. * * *" (at p 6

Both Article III and Article V of the draft gave the contractor discretion to acquire equipment for the facility. The provision in this draft authorizing "additions" to the facility to be paid for with capital advances was omitted from the later drafts.

3. Article V of Hanna's draft dated November 26, 1952 (P1 Ex 139), in its original typewritten form, was identical with the draft of November 24. It provided (at p 6) for capital advances

> " * * * (a) to construct, equip, design, rebuild and repair the Facility contemplated by Article III, and (b) for such replacements, additions, or improvements of the Facility which are deemed necessary or advisable by the Contractor during the period of this Contract and which, in accordance with generally accepted accounting practice, are capitalized."

By handwritten amendments to subsection (b), the word "additions" was deleted, the discretionary authority of the contractor to determine the necessity for capital expenditures was also deleted, and the reference to "generally accepted accounting practice" became physically separated from the provision for "replacements * * * or improvements" by the insertion of a catch-all provision covering other capital expenditures. As so amended, it provided:[3]

---

3. In this and subsequent cases, handwritten deletions are indicated and handwritten additions are underscored.

" * * * (b) for such replacements, ~~additions~~, or improvements of the Facility which are ~~deemed~~ necessary or advisable ~~by the Contractor~~ during the period of this Contract, and (c) for such other acquisitions and which, in accordance with generally accepted accounting practice, are capitalized."[4]

4. On December 9, 1952, Hanna prepared draft definitions of "capital cost" and "cost of production" which referred to "generally accepted accounting principles" (P1 Ex 140). The drafts are not shown to have been used or even submitted to the Government, and the record is silent as to their significance.[5] It is likely that the definitions became unnecessary, because the uses to which capital advances could be put were described in Article VI and working capital advances were to be available for all other costs (Article VI(2)).

5. The next draft is that of December 15, 1952 (P1 Ex 141). This draft, in its typewritten form, incorporated the handwritten amendments to the draft of November 26. It was, in turn, modified by handwritten amendment to read as follows:

" * * * (c) for such other necessary ~~acquisitions~~ expenditures, and which, in accordance with generally accepted accounting practice, are capitalized."

(at p 7)

6. The last draft disclosed by the record is dated December 19, 1952 (P1 Ex 142). In its typewritten form, Article IV and

---

4. Also by handwritten amendment, the various contract Articles were given the numbers they bear in the final contract.

5. The November 26 draft had noted that such definitions would be added. The notation was, however, deleted (P1 Ex 139, p 3).

Article VI of this draft did not affirmatively require the Government agreement to capital purchases, although provisions giving the contractor discretion to purchase them had been deleted from the draft of November 26. Consequently, Article IV of this draft was amended in handwriting to read:

> " * * * all equipment and facilities agreed to by the Gov't as necessary for such conversion * * *" (at p 4)

and Article VI 1(b) was amended in handwriting to read:

> " * * * (b) for such replacements and improvements of the Facility which are agreed by the Contractor and the Gov't to be necessary or advisable * * *"

Subparagraph (c), which in its typewritten form incorporated the amendments to the December 15 draft, was further amended in handwriting to read:

> " * * * (c) for such other necessary and so agreed upon expenditures, ~~and~~ which, in accordance with generally accepted accounting practice, are capitalized * * *"

7. Notes of the Government negotiators dated December 31, 1952 (Def Ex 122, p 3) disclose a dispute over the provision in the draft of Article VI for the capitalizing of all costs during "down periods" occurring before the end of Period 1, as follows:

> "We want to only capitalize such costs as are indicated by normal accounting practices * * *" [6]

---

6. The balance of the notation is illegible. On January 16, 1953, Colonel Robinson, the Government negotiator, noted the view that this provision was contrary to normal accounting practice, although Ernst & Ernst had rendered an opinion supporting it (Def Ex 83).

No. [illegible]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant and Cross-Appellee

v.

HANNA NICKEL SMELTING COMPANY, a corporation, and THE HANNA MINING COMPANY, a corporation

Appellees and Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

REPLY BRIEF FOR THE UNITED STATES AS APPELLANT

and

ANSWERING BRIEF AS CROSS-APPELLEE.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21,232

UNITED STATES OF AMERICA,

Appellant and Cross-Appellee,

v.

HANNA NICKEL SMELTING COMPANY, a corporation, and THE HANNA MINING COMPANY, a corporation,

Appellees and Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

REPLY BRIEF FOR THE UNITED STATES AS APPELLANT

and

ANSWERING BRIEF AS CROSS-APPELLEE.

I REPLY BRIEF

1. Introduction.

As we developed in our opening brief, this case arises from Hanna's contract to construct a new type of nickel smelting plant for the United States with capital funds furnished by the government, operate that plant, and sell the refined nickel to the government at its "cost of production." Hanna also got the right to buy the plant from the United States for a price equal to 7 and 1/2 percent of the capital

expended in its construction, an option which it exercised.

In this suit the government contends that Hanna overcharged the United States for refined nickel by includin in its "cost of production" some $1,400,000 in unauthorized expenditures for capital equipment it acquired for the plant and seeks recovery of that sum. In substance, we assert (1) that Hanna's acquisition of the smelter equipment in sui was not part of "costs of production" but rather was require by the contract to be purchased out of the capital funds advanced by the United States; (2) that Hanna's expenditures of capital funds for such equipment was permissible under the contract only if the government agreed that the equipment was "necessary or advisable," and (3) that government funds could not be used to purchase capital equipment beyond the dollar limit specified in the contract.

Thus, as our opening brief demonstrated, by charging capital expenditures to "production costs" Hanna breached its contract with the United States in several respects: First, it expended $1,400,000 in public funds fo capital items of smelter equipment in disregard of the government's contract right to pass on whether such equipme

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1/ Hanna's profit under this contract (some $10,000,000 in addition to its option to purchase the smelter at a very favorable price) came on the nickel ore which it sold to th government for use in the new smelter. In addition, Hanna received a management fee of $100,000 per year for operatin the smelter for the government. See our opening brief, pp. 2-11.

was actually necessary. Second, it expended public funds for capital items beyond the express $22,875,000 limit which the government contracted to make available for such expenditures. And, third, because the option price for the smelter was set by the contract at a fixed percentage of the government capital expended upon it, by charging the disputed items to "production costs" rather than to capital expenditures, Hanna enabled itself to obtain the disputed $1,400,000 in capital equipment absolutely free upon exercising its option to purchase the plant. On this basis we sought recovery of Hanna's unauthorized expenditure of $1,400,000 for smelter equipment which it passed along to the United States in the guise of "production costs".

The court below ruled that Hanna could not justify charging 38 of the items in suit (acquired for $231,605) to "cost of production" and awarded judgment to the government accordingly, a finding which Hanna does not challenge in this appeal (See Hanna brief, p. 56). The lower court upheld, however, Hanna's treatment of the 178 [2/] remaining

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2/ The reference to 216 disputed items in our opening brief (See, e.g., p. 11) includes both the 178 items with which this appeal is concerned and the 38 items which the court found Hanna improperly charged to the government and Hanna does not challenge here.

items (costing approximately $1,160,000) as production costs chargeable to the United States under "accounting practices in the smelting industry." For the reasons developed at length in our opening brief (pp. 37-85), we submit that the holding adverse to the government is plainly incorrect and contrary both to the terms of the contract and the evidence in the record. Far from rebutting our contentions in this regard, we think the answering brief of appellees underscores the correctness of our position.

2. Hanna's construction of the contract leaves key provisions without meaning.

The principal ground upon which the court below rested its decision was that, though the contract between them did not say so expressly, "the parties intended to apply accounting practices common to the smelting industry". (253 F. Supp. 791). The distinguishing feature of smelting accounting is that "replacements or improvements, even if long lived, are expensed unless they materially increase the capabilities or value of the plant considered as a whole" (ibid.) Thus, in awarding judgment to Hanna with regard to the 178 disputed items of equipment, the district court found that these items--though purchased for more than $1,160,000--increased neither the value nor the capability of the smelter and were therefore properly "expensed" (i.e., charged to "cost of production" borne entirely by the United States) not withstanding the fact that this equipment

concededly has a long useful life and is commercially valuable. We pointed out in our opening brief (pp. 47-53, 61-63) that the lower court's (and Hanna's)interpretation renders meaningless the express contract provision that "capital advances" were to be used "for such replacements or improvements of the Facility which are agreed by the Contractor and the Government to be necessary or advisable during the period of this contract." (Art. IV, par.1, emphasis supplied) As we there noted, under the court's theory no "replacement" would ever be capitalized. Indeed, this case graphically illustrates that point. Here, more than a million dollars worth of "improvements" and "replacements" in the smelter were effected by Hanna without increasing the plant's capabilities "considered as a whole".

In its answering brief (pp. 35-37), Hanna does not controvert our position regarding the effect of court's reading of the contract. Nor does it suggest any significant purpose for the contract language requiring replacements and improvements to be acquired out of government capital funds, and only if the government agreed. Rather, it merely says in substance that the court's result is precisely what the parties intended. (Hanna br. pp. 35-37) That contention makes a mockery of the contract. It means that Hanna could (and did) unilaterally replace items of equipment costing hundreds of thousands of dollars as it saw fit while shifting the full cost of these new

acquisitions entirely on the back of the United States. Moreover, Hanna could (and did) then obtain these items for its own commercial use absolutely free by exercising its option to acquire the plant. (The option price was fixed at 7 1/2 percent of the government capital advanced--but Hanna charged all the replacement machinery to "cost of production" thus not increasing its option price). In short, to read the contract as Hanna would have it would be like giving it a key to the Treasury. It makes virtually meaningless the contract's express dollar limitation on government capital advances contained in the contract as well as eliminates the government's right to insure that, as the contract period neared a close, Hanna could not expend government funds to replace expensive equipment for its own rather than the government's benefit.

On the other hand, our reading of the contract gives meaningful effect to the contract terms dealing with expenditures for "replacements" and "improvements" without being either harsh or unfair to Hanna's interests. It is to be borne in mind that Hanna's profit (ultimately in excess of $10,000,000) was to come from selling the nickel ore to the government, not from the operation of the nickel smelter. The latter was to be carried out at "cost" plus an agreed management fee (See our opening brief, pp. 2-4.) In addition, Hanna had the right to acquire the smelter for 7 and 1/2 percent of the capital advances expended in its

construction, subject to the $22,875,000 limit on capital advances specified in the contract. Reading the contract as we urge--and as we think it plainly should be read--means only that Hanna had to obtain the government's consent before making major expenditures for replacements and improvements to equipment and, in the event Hanna opted to buy the smelter, that Hanna pay 7 and 1/2 percent of the cost of such replacements and improvements which Hanna itself deemed "necessary or advisable". There is nothing unfair or overreaching about this requirement. We submit that the court below erred in rejecting the government's interpretation of the contract which, unlike Hanna's construction, gives reasonable effect to all the terms in the agreement. As this Court has noted, a meaningful construction of a contract is always preferable. Gray v. Travellers Indemnity Co., 28 F.2d 549 (C.A. 9); United Artists Corp. v. Strand Productions, 216 F.2d 305 (C.A. 9), See also, Restatement of the Law, Contracts, §236(a). In the language of Judge Browning, speaking for a unanimious court in Osborn v. Boeing Airplane Company, 309 F.2d 99, 103 n.8:

> "Where the choice is open, language relating to the terms of a contract will be so interpreted that the contract will be fair and reasonable rather than unfair and unreasonable."

In the case at bar, it is the government's interpretation which is "fair and reasonable". The district court was plainly mistaken in rejecting it.

3. The evidence shows that neither party contemplated the use of "smelting accounting" under this risk-free government contract.

It is not disputed that it is only if the parties intended to apply the unique accounting practices of the smelting industry that the 178 disputed items of equipment could be fully charged to the United States as "costs of production". We demonstrated in our opening brief that specific provisions of the contract itself (which of course control where applicable) required replacements and improvements to the smelter be paid for out of capital advances. We also showed (and Hanna's brief does not deny) that capital treatment of such acquisitions would be required under generally accepted accounting practices in industry at large (See our opening brief, pp. 77-91). We do not believe anything in Hanna's brief demonstrates that the parties intended to use "smelting accounting" under the contract in suit. On the contrary, we think a conspicious o mission from Hanna's argument makes plain the correctness of our position.

It is of course patent that the use of "smelting accounting" was extremely advantageous to Hanna under this contract. For under this system, Hanna would be able to (and did) make expensive improvements to and even replace a million dollars of high priced equipment in the smelter

as it saw fit, while at the same time placing itself in a position to acquire that equipment for itself entirely at government expense. Yet the contract nowhere provides that it is to be understood in the light of the singular practices inherent in "smelting accounting". And though Hanna's brief purports to trace the history of the negotiations leading up to the contract in suit (See pp. 27-30), nowhere in that history does Hanna point to a single reference to the unique accounting procedures in the smelting industry which it now insists both parties intended to apply all along. We think it incredible that if Hanna--much less the government--intended "smelting accounting" to govern, it would not even so much as make one mention of that fact during the entire course of contract negotiations. (We note that Hanna did not put its own contract negotiators on the stand.) It was Hanna--not the United States--which was in a unique position to be aware of the accounting practices peculiar to the smelting industry. It was Hanna--not the United States--which stood to gain considerably if smelting accounting applied. Hanna's negotiators skillfully and diligently drove a hard bargin in that company's interest. It is inconceivable that they would have left the company's right to use "smelting accounting"--literally a million dollar question--totally unmentioned not only in the contract but even in their proposals. This is particularly so when they were dealing with the government, a party not in the smelting business,

not negotiating an ordinary commercial smelting contract, and nowhere shown to be familiar with the special accounting practices adopted by some members of that industry.

We submit there is good reason why "smelting accounting" was not mentioned. It is inappropriate to the type of operation contemplated by these parties. This was not an ordinary competitive commercial smelting contract made in the context of a risky industry. On the contrary, it was for Hanna a risk-free, cost-reimbursable venture under which it stood to make enormous profit and the right (but not the obligation) to purchase a modern smelter at a fraction of its initial cost. In these circumstances, the complete absence of any reference to "smelting accounting" anywhere in the contract or anywhere in the contract proposals, we submit, conclusively demonstrates that the district court was plainly mistaken in ruling that the parties intended such practices to govern the contract in suit.

4. Hanna's contention regarding the application of estoppel to this case are without merit.

A. Hanna's brief does not suggest--and indeed it was not the case--that anyone in the government's employ ever expressly appooved of its application of "smelting accounting" practices to the contract in suit. On the contrary, Hanna acknowledges that it adopted these practices on its own. Rather, it notes that government auditors inspected its books in 1957, saw the accounting practices

being applied, and did not object to them. It is solely on this basis that Hanna urges, as to the period after January 1, 1958, that the failure of the government's auditors to object amounted to the government's "implied acquiescence" in Hanna's continued use of those accounting practices.

We pointed out in our opening brief, however, (pp. 86 ff.) that "implied acquiescence" by government employees is not enough to bar the government's claim, the Supreme Court having so held in circumstances far more egregious than those at bar. Utah Power & Light Co. v. United States, 243 U.S. 398, 409. To the same effect see this Court's decision in United States v. Riggins, 65 F.2d 750, 751 (C.A. 9); and Fansteel Metallurgical Corporation v. United States, 172 F. Supp. 268, 271 (Ct. Cls.). 3/ Hanna does not dispute the authority of Utah Power & Light Co. Instead, it tries to avoid the impact of that decision by asserting that the case is of limited application and governs only "situation[s] involving an exercise of the sovereign power of the United States." (br. p. 44). In Hanna's view, the holding of Utah Power & Light Co. does not apply to this case where the government is attempting to enforce contract rights, which Hanna characterizes as merely "proprietary,

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3/ See also United States v. California, 332 U.S. 19, 39-40, and Beaver v. United States, 350 F.2d 4, 7 (C.A. 9).

not sovereign" (br. p. 46). The short answer to that contention is that Hanna's purported "distinction" between "sovereign" and "contract or proprietary" rights has not been accepted by the Supreme Court, this Court and other courts of appeals. Thus, in Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, an agent of FCIC had erroneously misled respondents into the belief that they had contracted with FCIC to insure their wheat crop. In overturning a lower court decision that FCIC was precluded from denying such coverage because a private insurance company in similar circumstances would have been bound, the Court expressly rejected the distinction Hanna would have this Court make, ruling (332 U.S. at 383-384, emphasis supplied):

> And so we assume that recovery could be had against a private insurance company. But the Corporation is not a private insurance company. It is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore, conducted by private enterprise or engages in competition with private ventures. Government is not partly public or partly private, depending upon the government pedigree of the type of a particular activity or the manner in which the government conducts it.

This Court both quoted and applied this language in United States v. Willoughby, 250 F.2d 524, 530 (C.A. 9).

The dual nature of federal activities which Hanna espouses was also rejected in Fed. Land Bank v. Bismark Co., 314 U.S. 95. There it was urged that a State's tax on the money lending activities of land banks was constitutionally permissible because, though the banks were instrumentalities of the federal government, in making loans to individuals the banks were engaging in "proprietary" rather than "governmental" functions. In holding the State tax unlawful, the Supreme Court expressly rejected any such dichotomy in governmental activities (314 U.S. at 102):

> The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the federal government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental.

Similarly, in United States v. 93 Court Corporation, 350 F.2d 386 (C.A. 2, 1965), certiorari denied, 382 U.S. 984, the Second Circuit ruled that the doctrine of laches does not bar the United States from foreclosing a mortgage given to the R.F.C. as security for a business loan, also rejecting the distinction Hanna urges here by holding (350 F.2d 389):

> This rule allows the government to maintain belated actions to enforce public rights regardless of the "governmental" or "business" nature of the government-sponsored activity that created the rights.

And in Aiken v. United States, 260 F.2d 936 (C.A. 9), this Court squarely rejected the argument that the government could be barred from enforcing contractual rights against its lessee by failure to prosecute its claim diligently, stating (260 F.2d at 938, emphasis added):

> Finally, appellant argues that the government waited too long in making its demand for payment. However, this action is in contract, and it is well settled that the United States may sue at any time upon a contract, and neither limitation nor laches binds it.

The reason why the distinction Hanna urges cannot be drawn is interent in the very reason why negligence and laches cannot be imputed to the government. The classic explanation for the rule is that of Mr. Justice Story in United States v. Hoar, Fed. Cas. No. 15,373 (2 Mason 311, 26 Fed. Cas. 329, 330, D. Mass. 1821, emphasis supplied):

> The true reason, indeed, why the law has determined, that there can be no negligence or laches imputed to the crown, and, therefore, no delay should bar its rights,***is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation, or exception, introduced for the public benefit, and equally applicable to all governments.

Clearly, that rule is equally applicable to protect the public Treasury regardless of the "sovereign", "governmental" or "proprietary" nature of the government activity which

created the right in suit. See, also, United States v. Summerlin, 310 U.S. 414, 416; United States v. Rossi, 342 F.2d 505 (C.A. 9); McIndo v. United States, 194 F.2d 602 (C.A. 9); Cf., United States v. DeQueen and Eastern Railroad Co., 271 F.2d 597, 601, and cases cited. The authorities which Hanna cites, we submit, do not support its contrary contention. 4/

In addition, while we do not think it relevant, this is a situation involving an exercise of the "sovereign"

4/ United States v. Bostwick, 94 U.S. 53, dealt with the construction of a lease, not estoppel or laches; Krupp v. Federal Housing Administration, 285 F.2d 833, (C.A. 1), was a suit on an express warranty made by the government in a contract to sell real estate, no estoppel was involved; In McQuagge v. United States, 107 F. Supp. 460 (W.D. La.), the government's contracting officer finally accepted and paid for certain work as completed according to contract specifications under a contract providing that such acceptance could not be reopened except on evidence of fraud not present in the case, no question of "implied acceptance" was involved; United States v. Certain Parcels of Land, 131 F. Supp. 65 involved reliance on the affirmative representation of a government employee with actual authority to settle the land controversy in suit, and in any event is of doubtful authority since this Court declined to follow that decision in the later case of Beaver v. United States, 350 F.2d 4, 7, 9. Insofar as the Court of Claims in Branch Banking and Trust Co. v. United States, 98 F. Supp. 757, certiorari denied, 342 U.S. 893, and Roberts v. United States, Great American Insurance Co., 357 F.2d 936, employed language supporting the proposition that the government may be estopped by an act of waiver in the same manner as a private contractor "when the government is acting in its propriatary capacity," that language is in conflict with the express contrary holding of the Supreme Court in Federal Crop Ins. Corp. v. Merrill, supra, and they are therefore incorrectly decided.

power of the United States notwithstanding Hanna's contrary assertions. As Hanna acknowledges (br. p.2) the contract in suit was negotiated--as a matter of "urgency"--solely because "there was during the Korean War an acute shortage of nickel for critical defense needs, and no domestic source of supply". The government entered into this arrangement with Hanna not as an ordinary commercial venture, but to insure the United States' ability to obtain supplies necessary to the needs of national defense. It is disingenuous to imply that the government here expended more than thirty million dollars of public funds simply to enter the commercial nickel smelting business. (See our opening brief, pp. 2-4).

B. Hanna has also misconceived the thrust of our opening brief on the estoppel question. We agree that the court below cannot be said to have been "clearly erroneous" in finding that the government's auditors knew, or should have known, about Hanna's accounting practices as of January 1, 1958. However, Hanna is not correct in stating (br. p. 42) that we have abandoned the contention that the government could not be bound by their knowledge alone. Indeed, that is precisely the point we are making. Mere silence on the part of those auditors constituted at the very most "implied acquiescence" in Hanna's actions. And such "implied acquiescence" by itself, we demonstrated, is insufficient to preclude the United States from asserting its rights. In other words, this is a much stronger case than

one in which some government employees actually makes an erroneous misrepresentation. Here, no representations at all were ever made to Hanna by any government employee. And we certainly do not concede that anyone with actual authority to do so ever waived the government's rights under this contract or approved Hanna's accounting practices. The auditors had no such authority themselves. Hanna nowhere points to any evidence establishing that any person who did have such authority was even aware of Hanna's accounting practices in 1958, much less approved of them. The law is clear, we submit, that one who relies on the representations of a government agent must show that in fact the agent had actual authority to bind the United States. Federal Crop Ins. Crop. v. Merrill, 332 U.S. 380; United States v. Stewart, 311 U.S. 60, 70; Sutton v. United States, 256 U.S. 575; Whiteside v. United States, 93 U.S. 247, 256-257; Beaver v. United States, 350 F.2d 4 (C.A. 9).

Nor does Carrier Corporation v. United States, 328 F.2d 328, 164 Ct. Cls. 666, cited by Hanna, hold otherwise. In that case the majority of the Court of Claims found that the official with actual authority (an Assistant Secretary of the Army) had actual knowledge of the facts of the case and of the actions of his subordinates. It was his actual knowledge which the Court held to have bound the government to his subordinate's express representations. See 328 F.2d at 337 and findings of fact 25-28 at 166 Ct. Cls. 709-710.

Imputed knowledge is not enough. 5/ Even assuming Carrier Corporation to have been properly decided on its facts (but see the dissenting opinion of Judge Davis at 328 F.2d 339, 340-342), Hanna did not, and could not, make a comparable showing here. There is simply no evidence in this case--and Hanna has cited none--which establishes that anyone with actual authority to approve Hanna's accounting practices was at all aware of them, much less authorized their use under this contract. 6/

5/ See, Fansteel Metallurgical Corporation v. United States, 171 F. Supp 268, 271 (Ct. Cls. 1959); United States v. Riggins, 65 F.2d 750, 751 (C.A. 9); United States v. DePew, 100 F.2d 725, 728 (C.A. 10); Jones v. United States, 106 F.2d 888, 890-891 (C.A. 5); Halverson v. United States, 121 F.2d 420, 422-423 (C.A. 7), certiorari denied, 314 U.S. 695; United States v. Cooper, 200 F.2d 954, 956 (C.A. 9); United States v. Kiefer, 228 F.2d 448, 450-451 (C.A.D.C.), certiorari denied 350 U.S. 933; United States v. Sinor, 238 F.2d 271, 276 (C.A. 5); United States v. Willoughby, 250 F.2d 524, 528-531 (C.A. 9); United States v. Accardo, 113 F. Supp. 783, 785 (D. N.J.), affirmed on the opinion of the district court, 208 F.2d 632 (C.A.3), certiorari denied, 347 U.S. 952.

6/ Indeed, even if the contracting officer were aware of those practices his authority to approve them is doubtful. "The law is well settled that a contracting officer can chang change the terms of a contract to the benefit of the government but is not given authority to make a change which would adversely affect the Government." Fansteel Metallurgical Corporation v. United States, supra 172 F. Supp. at 270 (Ct. Cls.).

Finally, we call to the Court's attention that, at all events, estoppel is at most a partial defense to the government's claim on the merits. As the district court's opinion notes (253 F. Supp. 703), $841,403.62 of the government's claim relates to capital equipment purchased by Hanna and charged to production costs before January 1, 1958, the date as of which the lower court found that government agents "impliedly acquiesced" in Hanna's accounting practices. Consequently, the government's right to recover the $841,403.62 in expenditures improperly made by Hanna before that date would not be barred by estoppel in any case.

ANSWERING BRIEF FOR THE UNITED STATES
AS CROSS-APPELLEE

1. The district court correctly reformed the contract to express the true intent of the parties.

(a) Introduction and summary

Under the contract in question, Hanna was obligated to operate the smelter at maximum production and to deliver all the nickel refined to the government at its cost of production or at an agreed upon ceiling price, whichever was lower. This obligation was to continue until 125,000,000 pounds of nickel was delivered or until June 30, 1962, whichever occurred frist. Hanna was required to decide by that time whether it would exercise its option to purchase the smelter. 7/

By the early 1961 Hanna had already delivered to the government all but approximately 19,500,000 pounds of nickel contracted for, leaving less than a full year's production still to be delivered. In February, 1961, Hanna manifested its desire to exercise its option to purchase the plant (pl. ex. 130-1D), but it also desired an extension of

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7/ See our main brief, p. 9, fn. 14, for the terms of the option.

several years in which to deliver the final amount of nickel in order to obtain "the opportunity to use most of the smelter's production during that period to develop a commercial nickel market".[8/] The government, while not opposed to an extension of delivery time per se, wished to protect itself against any rise in production costs which might follow should Hanna not run the smelter at maximum capacity during any extended delivery period. The government also wished to make sure that, by agreeing to an extension of the delivery period, it would not be deprived of the benefit of Hanna's lowering costs of production, which at this point had been decreasing annually.

To achieve these ends the parties negotiated Amendment 5 to the contract. In substance, the amendment extended Hanna's time to deliver the remaining refined nickel three years to June 30, 1965, and relieved Hanna of the obligation to run the smelter at the maximum practicable rate and to deliver all the product to the government. The remaining 19,500,000 pounds of nickel were to be delivered to the government over the extended period at Hanna's cost of production (as before), or at a new ceiling price of 58.77 cents per pound, whichever was lower. It is this new ceiling price which is in dispute here.

8/ Hanna's brief, p. 69.

The district court found (as the government had contended) that the new ceiling price "was computed by an agreed formula which was based upon the difference between the company's cost of production in 1959 and 1960" (253 F. Supp. at 795). The court found, however, that Hanna had improperly included in its 1959 and 1960 cost figures over two hundred thousand dollars of capital expenditures, the effect of which was to raise the ceiling price under the formula. The court therefore reformed the contract so as to compute a ceiling price by applying the true cost figures to the formula. The result was to lower the ceiling price some 1.24 cents to 57.53 cents per pound. Accordingly, the court awarded judgment to the government for $241,798.32, plus interest. 9/

In this appeal, Hanna does not challenge the district court's finding that it overstated its production costs by

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9/ Hanna actually delivered only some 2,186,409 pounds of nickel under the 1961 agreement. After this suit was instituted, the parties entered into a termination agreement in which Hanna paid the government the approximate difference between the 58.77 cents lb./ceiling price and the market price of nickel for the remaining 17,313,454 pounds of nickel not delivered. They further agreed that if the court should reform the ceiling price downward, Hanna would pay the government an additional sum equal to 17,313,454 times the amount of the reduction. We do not understand Hanna to dispute that, if the decision of the court is affirmed, the mathematical computation of the court's award to the government is correct. See 253 F. Supp at

more than $215,000.00 (Hanna's brief, p. 56). Rather, it urges that the court erred in finding that the parties agreed on a formula for computing the 1961 ceiling price. In Hanna's view, the parties agreed only upon a new, fixed ceiling price. Accordingly, though that price was expressly computed on the basis of Hanna's own improperly inflated 1960 costs of production, Hanna asserts that the court was not entitled to reform the contract to reflect the true cost figures. We respectfully submit that Hanna's challenge to the court's decision on this issue should be rejected. For as we now show, the evidence supports the court's finding that the parties agreed to compute a new ceiling price by use of a formula, and the court properly reformed the contract to conform to the formula which the parties intended to apply.

(b) The meaning of the 1961 Amendment was a question of fact for the district court; its resolution of that issue must be upheld because not "clearly erroneous."

It is elementary that a written agreement which, through mutual mistake, fails to express the intention of the parties may be reformed to express that intention. Restatement of the Law of Contracts, §504. As the Supreme Court long ago stated, "[t]he jurisdiction of equity to reform written instruments, where there is a mutual mistake, or mistake on one side and fraud or inequitable conduct on the other, is undoubted;***." Simmons Creek Coal Co. v. Doran, 142 U.S. 417, 435 (1892). In this case, the district court found that the parties mutually intended that

court found that the parties mutually intended that the new ceiling price for nickel established under Amendment 5 be computed according to a formula which compared Hanna's 1960 costs of production with its 1959 costs, and that the amendment mistakenly applied incorrect cost figures for those years. On this basis the court reformed the contract by substituting the correct figures in formula. The district court's findings regarding mutual intent and mutual mistake are ones of fact which this Court has held may not be set aside unless "clearly erroneous". Lundgren v. Freeman, 307 F.2d 104, 113 (C.A. 9). 10/ In this case, there is ample support in the record for the trial court's findings on the parties' intent and mistake. The courts decision on the reformation issue must, therefore,

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10/ It is equally well established that where extrinsic evidence is introduced in aid of interpreting provisions of a written instrument--as in this case--the question of interpretation is one of fact for the trier of facts. West v. Smith, 101 U.S. 263; Rankin v. Fidelity Trust Co., 189 U.S. 242, 252-253; Pacific Portland Cement Co. v. Ford Mach. & Chem. Co., 178 F.2d 541, 549 (C.A. 9); Lowell O. West Lumber Sales v. United States, 270 F.2d 12, 17, (C.A. 9); Williston on Contracts (3rd Ed.) §616. See also, United States v. A. J. McKinnon, 289 F.2d 908 (C.A. 9), reversing 178 F. Supp. 913 (D. Ore.)

be affirmed. For, as this Court has stated in a case presenting striking parallel circumstances:

> We may not substitute our judgment [as to whether a contract should be reformed] if conflicting inferences may be drawn from the established facts by reasonable men, and the inferences drawn by the trial court are those which would have been drawn by reasonable men.

Lundgren v. Freeman, supra, 307 F. 2d at 113 (C.A. 9).

(c) The district court was not mistaken in finding that the parties agreed upon a formula for determining a new ceiling price for nickel in the 1961 amendment to the contract.

Hanna initiated the proposal to extend the delivery periods and terminate the contract, offering to supply the government the remaining nickel contracted for at 60 cents per pound or its actual cost of production, whichever was lower (Pl. Ex. 126-1D and 4D). As we noted, Hanna was already under contractual obligation to the government to supply that nickel at its cost of production. Thus, as far as the government was concerned, the significant part of Hanna's offer was the 60 cent ceiling price.

During the negotiations which followed Hanna's offer, the government was represented by Mr. James V. O'Dwyer (Pl. Ex. 136). Hanna's offer was rejected by the government because, as Mr. O'Dwyer testified (Pl. Ex. 136, p. 15), Hanna's operating costs had been descending over the years and, "should operations under the contract continue normally and

the material being produced at capacity in twelve to fifteen months, we could certainly expect to have the benefit of a lower -- a price lower than 60 cents." In other words, the government negotiators were of the view that if Hanna continued to operate the plant at full capacity its production costs -- and thus the cost of nickel to the government -- would drop below 60 cents per pound. They wished the government to retain the advantage of these projected lower costs notwithstanding any agreement which extended delivery dates and authorized Hanna to operate the smelter at production levels less efficient than full capacity. To achieve that goal, Mr. O'Dwyer testified, the government negotiators took the approach that the ceiling price should be determined by taking "the actual difference between the 1959-60 costs and deduct that" from the 60 cent figure proposed by Hanna (Pl. Ex. 136, p. 15).

Mr. O'Dwyer further testified that he obtained those 1959 and 1960 costs from figures "supplied by the Hanna Nickel Company", that he used them to compute the government's proposals for a new ceiling price under the formula mentioned, that he drafted a letter from the Acting Commissioner of Defense Materials to Hanna embodying the government's counter-proposal (id. at 16), and the proposal in that letter is computed under the formula described (id. at 17). That letter, which both explains and illustrates the formula under which the government was prepared to agree

to an extension of the delivery period, reads in pertinent part as follows (Pl. ex. 136-5D, emphasis added):

> We are agreeable in principle to the development of a mutually satisfactory arrangement under which the aims expressed in your communication will be accomplished. It is essential, however, that the Government satisfy itself insofar as it is possible to do so that it will not pay any more for the ferronickel to be delivered over the period of 4 1/2 years than it would pay were the material to be delivered over the course of the next year to 15 months as provided in our Contract DMP-50. To this end we call your attention to the inclusion of non-recurring charges in 1959 and 1960 and to a net reduction in production costs for the calendar year 1960 as compared with that of 1959 of 1.2 cents per pound, calculated as follows:

	Cost Per Lb.
Average for calendar year 1959	$ .6130
Less: Storage Cost 1959 $26,292.64	.0013
Adjusted Average for 1959	$ .6117
Average for calendar year 1960	$ .6001
Less: Storage Cost 1960	.0004
Adjusted Average for 1960	$ .5997
Reduction in cost from 1959 to 1960	$ .0120
Adjusted average for calendar year 1960	$ .5997
Less Reduction in cost from 1959 to 1960	.0120
Projected Costs for Balance of Contract	$ .5877

> We think it is reasonable to project a production cost for 1961 at $ .5877 per pound, and that this is a necessary precaution on the part of the Government since it has been indicated to us that during the next 12 to 15 months you may not find it practicable to operate at capacity.
>
> Subject to a satisfactory adjustment of all the other conditions of your proposal, with respect to which we think there will be no problem, we are willing to execute such amendatory agreements as are necessary to consummate the transaction on the

> basis of $ .5877 per pound or your actual average cost of production during the year in which the ferronickel is delivered to the Government, whichever is lower. This contemplates that the proposed agreements will be effective as of March 31, 1961.

The government's letter thus sets out with precision the formula and figures used. The proposed ceiling price of 58.77 cents mentioned in the letter was determined, as the Court can easily check, by simple mathematical application of the formula.

Hanna responded by letter dated March 14, 1961 (Pl. Ex. 136-6D, emphasis added):

> This is to advise you that Hanna Nickel Smelting Company accepts the proposal set forth in your letter of March 9 in regard to terminating Contracts DMP-49, DMP-50 and DMP-51, and substituting therefor provisions to extend to June 30, 1965 the balance of deliveries under present Contract DMP-50 at a price of $ .5877 per pound of contained nickel or our average cost of production per year, whichever is lower. Your proposal contemplates that these arrangements will be effective as of the end of this month.
>
> I assume that you will arrange to have prepared and furnished to us drafts of the appropriate agreements to carry out these understandings.

It is on the basis of the government's proposal, and Hanna's acceptance of that proposal, that Amendment 5 to the contract is to be understood. That Amendment reads in pertinent part:

> * * * The 19,499,863 pounds of contained nickel shall be produced by the Contractor after March 21, 1961 and shall be delivered to the Government at such time or times after March 31, 1961 and prior to June 30, 1965 as the Contractor

> in its sole discretion shall determine, at a price per pound of contained nickel which shall be equal to (a) the Contractor's average actual cost of production per pound of contained nickel in the calendar year in which such ferronickel is delivered to the Government or (b) $0.5877, whichever is less.

On the basis of this evidence, the court below found that the ceiling price of 58.77 cents per pound adopted by the parties in Amendment 5 "was computed by an agreed formula which was based on the difference between the Company's costs of production in 1959 and 1960." The court having also found that Hanna had erroneously included in those cost figures matters which should not have been expensed (a finding which Hanna does not challenge), decreed that: "The 1961 agreement will be reformed by applying the Company's costs for 1959 and 1960, as adjusted to conform to this opinion, to the formula employed at the time of the original agreement" (253 F. Supp. at 795).

Hanna urges that the court erred in finding that it had intended to agree to a formula to determine a new ceiling price. The substance of its contention is that it was assenting only to the figures (i.e., 58.77 cents) contained in the letter, and that reformation was not appropriate because there was no mutual mistake about that figure. But as its letter states Hanna gave its assent to the government's proposal, and that proposal was plainly based on the formula in the letter. To be sure, the government's proposal did not use the word formula. But the letter set

out the formula itself and specified that it was being used "to project a production cost for 1961" because, if the contract delivery period were extended, Hanna "may not find it practicable to operate at capacity", thus precluding the possibility of determining Hanna's actual production costs while operating at maximum efficiency for 1961.

In sum, we submit there can be no doubt from the face of the letter itself, that the government was proposing a new ceiling price based on a formula -- expressly illustrated in that letter -- to protect itself because Hanna's actual future production costs might be increased for reasons relating to its search for commercial markets and not because of its operations in supplying nickel to the government. And there can also be no doubt that the government's proposed formula intended to use Hanna's actual costs for 1959 and 1960. It simply makes no sense to assume that the parties were negotiating on any other basis, for the formula is meaningless if the crucial "cost" figures are assumed to include capital expenditures.

We think the foregoing review of the evidence firmly supports the court's finding that the parties negotiated a formula for a new ceiling price, and that the court did not err in reforming the contract to reflect the true figures which the parties intended to use in the formula. At all events, however, that evidence provides ample basis on which the court below could reach a conclusion to that effect.

Even if another court might differ on the inferences to be drawn from the evidence, it would not be grounds for rejecting the lower court's decision here. For, as this Court has stated, in such circumstances "it cannot be said that the conclusion reached by the trial court is clearly erroneous." Pacific Portland Cement Co. v. Ford Mach. & Chem. Corp., 178 F.2d 541, 549 (C.A. 9).

Nor is there merit to Hanna's alternate contention that the trial court's decision to reform the ceiling price is a "gross inequity." (Br. p. 80). Surely there is nothing inequitable about refusing to give effect to $215,110 in "costs" which, as the court below particularly noted "the Company's [own] witnesses frankly admit to be capital items under the [smelting] accounting practices previously discussed" (253 F. Supp at 792), a conclusion which Hanna does not challenge here.

For the reasons stated, we submit that the court's decision on reformation is correct and should be affirmed.

2. The district court did not abuse its discretion in awarding prejudgment interest to the government.

The district court awarded judgment for $231,506.28 to the United States in compensation for capital expenditures which Hanna had improperly charged to the United States as reimbursible production costs (see 253 F. Supp. at 796). Hanna does not challenge this portion of the judgment, but does dispute the court's award of prejudgment interest. Hanna tacitly recognizes (br. 81) -- as indeed it must -- that prejudgment interest is a matter within the district court's discretion to award in appropriate circumstances. 11/ Hanna contends, however, that prejudgment interest was "inequitable" in this case because the amount it owed the government was "unliquidated" and "essentially incapable of ascertainment before trial" (br. 82). Hanna's arguments on this point, we submit, are plainly without merit.

a. The court awarded judgment to the government only for these items which Hanna's own witnesses "frankly admit[tid] to be capital items under the [smelting] accounting practices previously discussed" (253 F. Supp. at 792), and which the district court found that the Company had "expensed in 1960 and 1961 solely to obtain reimbursement" from

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11/ Funkausen v. Preston Co., 290 U.S. 163; Miller v. Robertson, 266 U.S. 243, 258; United States v. U.S. Fidelity Co., 236 U.S. 512, 528; Continental Oil Co. v. United States, 184 F. 2d 802, 822 (C.A. 9), 5 Corbin, Contracts, § 1046 (1964 ed.); McCormick, Damages, § 54 (1935 ed.).

the government. (id. at 793). Hanna does not challenge those findings. In other words, Hanna had no accounting excuse for billing and accepting payment from the government for these capital items. Thus, from the moment the government paid for them, Hanna had the use of the government's money without justification. The courts have long recognized that one who has made an overpayment to another, or one who has been underpaid, is entitled to interest from the date of the erroneous payment. Ardelphia Co. v. St. Louis S. W. Ry. Co., 249 U.S. 134; Mitchell v. Riegal Textile, Inc., 259 F.2d 954, 956 (C.A.D.C.). Hanna was under a legal duty to return the overpayments to the government when they were received. At that time the government had had a right of action to recover the money and a matured and liquidated debt became immediately due.

Moreover, there is no doubt that the debt was certain and liquidated. The amount of the government's claim was easily ascertained by simple mathematical computation. As stated in McCormick, Damages, supra, p. 216:

> [W]here the amount sued for may be arrived at by a process of measurement of computation from the data given by the proof, without any reliance upon opinion or discretion after the concrete facts have been determined, the amount is liquidated and will bear [pre-judgment] interest. See also 5 Corbin, Contracts, supra, §1046, p. 284.

In this case, there has never been a dispute between the parties about the correctness, arithmetically, of the amount of the government's claim. All parties have accepted and

agreed to the amount of each individual item in issue as evidenced by Plaintiff's Exhibit 82. In this respect there is no difference between this litigation and a lawsuit where the plaintiff is suing the defendant on two notes of $1,000 each. In both instances the amount controversy is fixed, certain and liquidated; the only area of dispute is defendant's liability on each item. That Hanna denied its liability to the government does not transform the claim to one for an unliquidated amount, just as the denial of liability by the maker of the hypothetical $1,000 notes does not compel the classification of that suit as a claim for an unliquidated sum. As the Tenth Circuit held in Anderson-Prichard Oil Corporation v. Parker, 245 F.2d 831, 837:

> The fact that defendant, in good faith, denies the claim or the breach of contract does not prevent the allowance of interest. Restatement, Contracts, §337, comment (d); 12/ United States v.

12/ Restatement, Contracts, §337, comment (d), states: "The fact that the defendant in good faith denies the existence of the debt or other duty asserted by the plaintiff, or denies that he has committed any breach of contract, does not prevent the allowance of [pre-judgment] interest as damages for his breach."

Stephanidis, D.C. E.D.N.Y., 41 F.2d 960; Hansen v. Covell, 218 Cal. 622, 24 P.2d 772, 89 A.L.R. 670; Lacy Mfg. Co. v. Gold Crown Mining Co., 52 Cal. App.2d 568, 126 P.2d 644; Texas Co. of Mexico, S.A. v. Roos, 5 Cir., 43 F.2d 1, certiorari denied 282 U.S. 902 51 S.Ct. 216, 75 L.Ed. 794.

See also, McCormick, Damages, supra, pp. 215-216.

The rule could hardly be otherwise, for if it were, by the simple expedient of denying his liability, a defendant could easily avoid the payment of prejudgment interest and thereby retain the plaintiff's money without charge. 13/

13/ The same considerations, we submit, also justified the court's award of prejudgment interest on the reformation claim. The contract was reformed because the production cost figures Hanna supplied included the identical unjustifiable capital expenditures discussed. Here, too, as a result of its own unjustified action, Hanna caused the government to overpay for nickel, and the government is entitled to be fully compensated for the use of its money.

b. Moreover, even assuming, arguendo, that the government's claim was not liquidated, the district court nonetheless was acting within its discretion in allowing prejudgment interest as part of the government's damage award. The Supreme Court has recognized (Concordia Ins. Co. v. School Dist., 282 U.S. 545, 554-556):

> * * * that even in a case of unliquidated damages, "when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages." Miller v. Robertson, 266 U.S. 243, 257-259, and cases cited. See also Standard Oil Co. v. United States, 267 U.S. 76, 79; Berhard v. Rochester German Ins. Co., 79 Conn. 388, 397.

That rule has regularly been applied in instances where, though the exact amount due was not ascertainable until trial, the court in its discretion believed prejudgment interest appropriate in order to provide full compensation to the injured party. See, e.g., St. Paul Mercury Indemnity Co. v. United States, 201 F. 2d 57, 60-62 (C.A. 10); E. I. Dupont De Nemours & Co. v. Lyles & Long Const. Co., 219 F. 2d 328, 341-342 (C.A. 4); Railroad Credit Corporation v. Hawkins, 80 F. 2d 818, 825-826 (C.A. 4), certiorari denied, 298 U.S. 667; Clarke Baridon, Inc. v. Merritt-Chapman & Scott Corp., 311 F. 2d 389 (C.A. 4). Here, the district court plainly considered the interest award as necessary to make whole the government's loss as a result of Hanna's use of its money, stating (253 F. Supp. at 796, emphasis added):

> This is a classic case of unjust enrichment. From the dates of overpayments, the Company has had the use of the Government's money. The amounts of the overpayments, as well as the dates, have always been subject to ready calculation, once the existence of a breach was determined. I have held that the Company breached the contract only in those instances where it was unable to justify its accounting decisions under the standard of generally accepted accounting practices. The Government is entitled to interest at the rate of six per cent per annum from the dates of overpayment, both on the $231,506.28 overpaid under the 1961 agreement.

We respectfully submit that the Court's decision in Continental Oil Co. v. United States, 184 F. 2d 802 (C.A. 9), a case in which a defendent similarly opposed the government's claim for prejudgment interest in a breach of contract suit on the ground that the claim was "unliquidated", is fully applicable here. The court there stated (184 F. 2d at 822):

> It is our view that it was for the trial court to determine as a question of fact the amount of the Government's loss on this item. We think it was a situation such as that discussed in Miller v. Robertson, 266 U.S. 243, at page 258, 45 S. Ct. 73, at page 78, 69 L. Ed. 265, where the court said: "Generally, interest is not allowed upon unliquidated damages. * * * But when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages.
>
> The rule permitting an award of interest "in the discretion of the court" is one of general recognition. Restatement of the Law of Contracts, § 337(b). Such a discretion, in a proper case, may be that of judge or of jury, but like other questions of the amount of damages, it is a question for the trial court, and it is its discretion that has been exercised here. We are not permitted to disturb it, for we think the court might properly conclude that the Government could not otherwise be made whole in respect to what it lost * * * .

In the instant case, as in Continental Oil, the government was deprived of the use of its money solely as a result of the defendant's conduct. Here, as there, the district court awarded prejudgment interest in order to make the government whole. In this case, as in Continental Oil, the award was a proper exercise of the trial court's discretion which should not be disturbed on appeal.

CONCLUSION

For the reasons stated above and in our main brief: (1) to the extent the judgment of the district court denies the United States the relief sought, it should be reversed and the case remanded to the district court for the entry of an additional judgment against the appellees in the amount of $1,168,671 (or, if the Court adopts the Government's alternative position, in the amount of $1,145,241) together with interest at 6 percent per annum from the dates of the overpayments until the judgment is paid; [14/] and (2) to the estent the judgment of the district court awards the United States the relief sought, it should be affirmed and the judgment entered in this Court, pursuant to Rule 24(1) of

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14/ See note 54 on page 93 of our main brief.

the Court's rules, for interest on the judgment below from April 27, 1966 (the date of entry of the judgment) until it is paid. 15/

Respectfully submitted,

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DECEMBER 1967

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Richard S. Salzman
RICHARD S. SALZMAN
Attorney.

15/ See note 56 on page 94 of our main brief.

AFFIDAVIT OF SERVICE

CITY OF WASHINGTON)
DISTRICT OF COLUMBIA) ss.

RICHARD S. SALZMAN, being duly sworn, says:

That on December , 1967, he caused three copies of the foregoing reply brief for the United States as appellant and answering brief as cross-appellee to be served upon appellees, cross-appellants by placing them in the United States Mail, air mail postage prepaid, in an envelope addressed to counsel as follows:

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RICHARD S. SALZMAN
Attorney,
Department of Justice,
Counsel for appellee.

Subscribed and Sworn to before
me this day of December, 1967.

[Seal]

NOTARY PUBLIC

My Commission expires April 14, 1972.